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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 957.

JOHN STEEL, SARAH RAY, JOHN MILL, A. M. JONES, HARRY KNEELAND, JOHN O'BRIEN, J. S. MANNING, PETER THOMAS, AND ENFIELD, PLAINTIFFS IN ERROR,

VS.

THE ST. LOUIS SMELTING AND REFINING COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

FILED OCTOBER 2, 1882.

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1 Pleas in the circuit court of the United States for the district of Colorado, sitting at Denver.

Be it remembered that heretofore, and on, to wit, the 7th day of October, A. D. 1879, came A. W. Stone, esq'r., an attorney of said court, and filed in said court a transcript of proceedings heretofore had in the district court of the fourth judicial district of the State of Colorado, sitting in and for the county of Lake, in a certain cause in said district court lately pending, wherein The Saint Louis Smelting and Refining Company was plaintiff and Ray, John Steel, John Mill, A. M. Janes, Harry Kneeland, J. O'Brien, J. T. Maroney, Enfield, Thomas (the Christian names of Enfield and Thomas being unknown to plaintiff), were defendants. And the said transcript is in words and figures as follows, to wit:

TRANSCRIPT FROM LAKE COUNTY.

District court, Lake County.

STATE OF COLORADO,
Lake County, ss:

2 Pleas in the district court of the fourth judicial district of the State of Colorado, sitting within and for the county of Lake, before the honorable Thomas M. Bowen, judge of said judicial district, at a term thereof begun and holden at the court-house in the city of Leadville, in said county, on the first Monday (it being the fifth day) of May, A. D. one thousand eight hundred and seventy-nine.

Present: Honorable Thomas M. Bowen, judge of the district court of the 4th judicial district of the State of Colorado; Columbus W. Burris, esq., district attorney of said district; Ledyard R. Tucker, sheriff of said county; Charles W. Taylor, clerk of said court.

Be it remembered that heretofore, and on, to wit, the 6th day of May, A. D. 1879, the same being one of the regular juridical days of the May term, A. D. 1879, of said court, the following proceedings, inter alia, were had and entered of record in said court, to wit:

3 ST. LOUIS SMELTING AND REFINING COMpany
vs.
JOHN STEEL ET AL. } 115. Ejectment.

At this day it is ordered by the court that the demurrer to the complaint herein be set down for argument on the docket of this court as number sixty-eight (68).

Afterwards, and on, to wit, the 15th day of May, A. D. 1879, the same being one of the regular juridcial days of the said May term, A. D. 1879, of said court, the following proceedings, inter alia, were had and entered of record in said court, to wit:

ST. LOUIS SMELTING AND REFINING COMPANY
vs.
RAY ET ALS. } 115. Ejectment.

At this day comes said plaintiff, by C. I. Thomas, esq., its attorney, and

by leave of court files herein its petition for the appointment of a receiver herein. And thereupon, on motion of said plaintiff, it is ordered
4 by the court that said defendants plead petition by the incoming of court on Monday next, the 19th inst.

Afterwards, and on the same day, to wit, the 15th day of May, A. D. 1879, the same being one of the regular juridical days of the said May term, A. D. 1879, of said court, the following proceedings, inter alia, were had and entered of record in said court, to wit:

ST. LOUIS SMELTING AND REFINING COMPANY
vs.
RAY ET AL. } 115. Ejectment.

At this day it is ordered by the court that D. E. Parks, esq., attorney for said defendants, have leave to withdraw from the files the petition herein, and retain the same until the incoming of court Monday next, the 19th inst.

Afterwards, and on, to wit, the 20th day of May, A. D. 1879, the same being one of the regular juridical days of the said May term, A. D. 1879, of said court, the following proceedings, inter alia, were had and
5 entered of record in said court, to wit:

ST. LOUIS SMELTING AND REFINING CO.
vs.
RAY ET ALS. } 115. Ejectment.

At this day come said defendants, by D. E. Parks, esq., their attorney, and by leave of court filed their petition and bond for the removal of this cause to the circuit court of the United States for the district of Colorado.

Afterwards, and on this same day, to wit, the 20th day of May, A. D. 1879, the same being one of the regular juridical days of the said May term, A. D. 1879, of said court, the following proceedings, inter alia, were had and entered of record in said court, to wit:

ST. LOUIS SMELTING AND REFINING CO.
vs.
RAY ET ALS. } 115. Ejectment.

At this day come said defendants, by D. E. Parks, esq., their attorney, and present to the court here their petition and bond for the re-
6 moval of this cause to the circuit court of the United States for the district of Colorado.

And the court having examined the same doth accept said petition and bond, and doth order that said cause be, and the same hereby is, removed to said circuit court. And let the clerk of this court make a transcript of all papers filed in this action, together with all orders of court had and entered of record herein, and certify the same to said circuit court with all convenient speed upon payment of the costs remaining due in this behalf.

STATE OF COLORADO,
County of Lake, ss:

I, Chas. W. Taylor, clerk of the district court in and for said county of

Lake, in the State aforesaid, do hereby certify that the above and foregoing is a true, correct, and complete transcript and copy of all orders had and entered of record in a certain cause in said court lately depending, wherein the Saint Louis Smelting and Refining Company was plaintiff and Ray et al. were defendants.

7 I do further certify that the papers hereto attached and marked "A," "B," "C," "D," "E," "F," "G," "H," and "I," are true, correct, and complete copies of all the original papers on file in my office in said cause.

In witness whereof I have hereunto subscribed my name and the seal of said court affixed, at Leadville, in said county and State, this 4th day of October, A. D. 1879.

{ DISTRICT COURT } (S'g'd) CHAS. W. TAYLOR, *Clerk*,
{ SEAL. } By WM. RAYMOND, *Deputy*.

STATE OF COLORADO,
County of Lake, ss:

In the district court of the fourth judicial district of Colorado, sitting in and for the county of Lake.

THE SAINT LOUIS SMELTING AND REFINING Company, plaintiffs,
vs.
RAY, JOHN STEEL, JOHN HILL, A. M. Janes, Harry Kneeland, J. O'Brien, J. T. Maroney, Enfield, Thomas (the Christian names of said Enfield and Thomas being unknown to plaintiff), defendants. } A.

8 The plaintiff complains of the defendants and states that it, the said plaintiff, is a corporation duly organized, created, and incorporated under and by virtue of the laws of the State of Missouri, with power to purchase, own, and hold real estate; that it is the owner in fee, and entitled to the possession of the following described real estate, situate in the county of Lake, and State of Colorado, to wit:

Lot number ten (10) in block number two (2), as shown upon a map and plot of town lots made by the plaintiff, entitled The St. Louis Smelting and Refining Company's addition to the city of Leadville, which map and plat is duly filed in the office of the clerk and recorder of said county, and that the defendants wrongfully withhold said premises from the plaintiff, to its damage in the sum of one thousand dollars; the plaintiff therefore asks judgment against the defendants for the recovery of the possession of said premises, for said sum of one thousand dollars, its damages for the detention of the same, and for its costs herein.

9 THOMSON, HEREFORD & SAYER,
Attorneys for Plaintiff.

(Endorsed:) 115. St. Louis S. & R. Co. vs. Ray, J. Steel, J. Mill, et al. Complaint. Filed April 23d, 1879. Cha's W. Taylor, clerk. Thomson, Hereford & Sayer, pl'ff's att'y.

In the district court of the 4th judicial district of the State of Colorado, sitting within and for the county of Lake.

STATE OF COLORADO,
County of Lake, ss:

IN THE MATTER OF ST. LOUIS SMELTING AND Refining Company,
vs.
RAY, JOHN STEEL, JOHN MILL, A. M. Janes, Harry Kneeland, J. O'Brien, J. T. Maroney, Enfield, and Thomas. } B.

I do hereby enter myself security for costs in this case, and acknowledge myself bound to pay, or cause to be paid, all costs which may
10 accrue in this action, either to the opposite parties or to any of the officers of this court, pursuant to the laws of the State of Colorado.
Dated this 23rd day of April, A. D. 1879.
(S'g'd) WILLIAM N. LOKER.

(Endorsed:) 115. In the district court, Lake county. Security for costs. St. Louis S. & R. Co. versus Ray, Steel, et al.

Approved by me and filed in the office of the district court this 23rd day of April, A. D. 1879.
(S'g'd) CHA'S W. TAYLOR, *Clerk.*

Summons.

In the district court of the fourth judicial district of the State of Colorado, in and for the county of Lake.

STATE OF COLORADO,
County of Lake, ss:

THE SAINT LOUIS SMELTING AND REFINING Company, plaintiff,
vs.
RAY, JOHN STEEL, JOHN MILL, A. M. Janes, Harry Kneeland, J. O'Brien, J. T. Maroney, Enfield, Thomas (the Christian name of said Enfield and Thomas being unknown to plaintiff), defendants. } C.

11 The people of the State of Colorado send greeting to the said defendants above-named:

You are hereby required to appear in an action brought against you by the above-named plaintiff, in the district court of the fourth judicial district of the State of Colorado, in and for the county of Lake, and to answer the complaint filed therein within ten days exclusive of the day of service, if served within this county, or, if served out of this county but in this district within twenty days; otherwise, within forty days; or judgment by default will be taken against you, according to the prayer of the complaint.

The said action is brought to recover possession of the following-described real estate, situate in the county of Lake and State of Colorado, to wit, lot number ten (10) in block number two (2) of the St. Louis Smelting and Refining Company's addition to the city of Leadville, and for judgment for the sum of one thousand dollars damages for the detention thereof, as will more fully appear by the complaint on file herein,
12 to which reference is here made. And you are hereby notified that if you fail to appear and answer to the said complaint as above required, the said plaintiff will apply to the court for the relief demanded in the complaint.

Given under my hand and the seal of the district court of the fo'rth judicial district of the State Colorado, in and for the county of Lake, this 23rd day of April, A. D. 1879.

[L. S.] CHAS. W. TAYLOR, *Clerk.*

STATE OF COLORADO,
County of Lake, ss:

I do hereby certify that I have duly executed the within summons, on this 24th day of April, A. D. 1879, by delivering to each of the within-named defendants, Ray, John Steel, John Mill, A. M. James, Harry Kneeland, J. O'Brien, J. F. Maroney, Enfield, and Thomas, a true copy thereof, and at the same time reading to each of them this the original summons. Done at Leadville, county and State aforesaid.

(S'gd) L. R. TUCKER, *Sheriff,*
By W. H. BRIGHT,
Under Sheriff.

13 (Endorsed:) 115. St. Louis S. & R. Co., plaintiff, versus Ray et als., defendants. Summons. District court. Filed this 26th day of April, A. D. 1879. (S'gd) Chas. W. Taylor, clerk.
Sheriff's fees: Service, 6.75; mileage, 1.00; return, 75—$8.50, p'd.
Thomson, Hereford & Sayer, attorney for plaintiff.

STATE OF COLORADO,
County of Lake, ss:

In the district court in and for the county aforesaid.

THE SAINT LOUIS SMELTING AND REFINING Company, plaintiff,
vs.
RAY, JOHN STEEL, JOHN MILL, A. M. James, Harry Kneeland, J. O'Brien, J. F. Maroney, Enfield, Thomas (the Christian names of said Enfield & Thomas being unknown to plaintiff'), defendants. } D.

The defendants Solomon Enfield and Peter Thomas demur to the complaint, and for cause of demurrer say:

14 1st. That the said complaint does not state facts sufficient to constitute a cause of action in this court; that it is averred in said

complaint that the plaintiff is a foreign corporation, and it is not stated therein that it has made and filed a certificate, signed by the president and secretary of such corporation, duly acknowledged, with the secretary of state, and in the office of the recorder of deeds of the county in which its business is carried on, designating the principal place where the business of said corporation, shall be carried on in this State, and an authorized agent or agents in the State of Colorado at its principal place of business upon whom process may be served.

2nd. That no facts are stated in said complaint showing the plaintiff to be the owner in fee, or that it is entitled to the possession of the premises mentioned in said complaint, or that it is authorized to hold real estate in the State of Colorado.

3rd. The property sued for is not described by metes and bounds,
15 or by any other description, so that the same may be located with any certainty; that no map or plat is attached to said complaint designating the premises sought to be recovered in said action.

4th. It is not shown that the said plaintiff made any addition to the city of Leadville, nor that any map or plat of the said alleged addition was ever filed with the clerk or recorder of the city of Leadville; nor that the city ever accepted of such alleged addition.

5th. It is not shown in said complaint how or in what manner the defendants unlawfully withhold the possession therein mentioned from the plaintiff.

6th. Because the plaintiff does not show any title, right, or interest in and to the property in said complaint mentioned, nor any right to the possession of the same.

7th. That the said plaintiff has no legal capacity to sue, and does not show any right to have, hold, recover, and enjoy the property sued for.

16 Wherefore the defendant prays judgment that the said plaintiff be barred from having or maintaining its aforesaid action thereof against him.

(S'gd) A. W. STONE,
Defendants' Attorney.

(Endorsed:) 115. In district court, Lake County. The St. Louis Smelting and Refining Co. vs. Solomon Enfield et al. Demurrer. Filed April 28th, 1879. (S'g'd) Chas. W. Taylor, clerk. Stone.

Demurrer.

STATE OF COLORADO,
Lake County, ss:

In the district court of the 4th judicial district, held within and for said county.

THE SAINT LOUIS SMELTING AND REFINING Company, pl'ff,
vs.
SARAH RAY, JOHN STEEL, JOHN MILL, A. M. James, Harry Kneeland, J. O'Brien, J. F. Maroney, Thomas, Enfield, def'ts. } E.

17 All the above-named defendants, except Enfield, demur to the complaint of the plaintiff herein, and for cause of demurrer allege:

I. That said complaint does not state facts sufficient to constitute a cause of action.

(S'g'd) YATES & PARKS,
Said Defendants' Att'ys.

(Endorsed:) G. D. No. 115. St. Louis S. & R. Co. vs. Sarah Ray et al. Demurrer. Yates & Parks, def'ts' att'ys. Filed May 3d, 1879. (S'g'd) Chas. W. Taylor, clerk.

STATE OF COLORADO,
County of Lake, ss:

In the district court of the 4th judicial district of Colorado, in and for said county.

ST. LOUIS SMELTING AND REFINING COMPANY, plaintiff,
vs.
18 SARAH RAY, J. STEEL, J. MILL, A. M. Jones, H. Kneeland, J. O'Brien, J. T. Maroney, Enfield, and Thomas, defendants. } F.

The above-named plaintiff, The St. Louis Smelting and Refining Company, comes and shows to this court that on the 23d day of April, A. D. 1879, it filed in the office of the clerk of said district court its complaint in this cause against the above-named defendants for the recovery of the possession of the following-described real estate, situate in the county of Lake and State of Colorado, to wit:

Lot number ten (10) in block number two (2), as shown upon a map and plat of town lots made by the plaintiff, entitled "The St. Louis Smelting and Refining Company's addition to the city of Leadville;" which map and plat is duly filed in the office of the clerk and recorder of said county, and for damages for the detention thereof; and that said defendants were served with process in said cause on the 24th day of
19 April, A. D. 1879.

And the plaintiff states that at the time of said filing of said complaint it was and still is the owner of said real estate in fee, and entitled to the possession thereof, and that the defendants then did and still do wrongfully withhold the same from it, as is fully stated in said complaint.

The plaintiff further states that said premises are occupied by large and valuable improvements which belong thereto; that the defendant Ray is in possession of and claims the same as landlord of the defendants Steel, Mill, Jones, Kneeland, O'Brien, Maroney, Enfield, and Thomas; that said defendants Steel, Mill, Jones, Kneeland, O'Brien, Maroney, Enfield, and Thomas occupy the same as tenants of said Ray, and that said Ray, as such landlord, is receiving and deriving from said premises and from said Steel, Mill, Jones, Kneeland, O'Brien, Maroney, Enfield, and Thomas, as such tenants, occupying said premises, large sums of money as rents
20 for said premises, to which rents the plaintiff is entitled, and threatens, and will continue so to do unless restrained therefrom

by the order of this court; that the entire rental value of said premises is dollars per month, and the plaintiff is entitled to the use and occupation of said premises and to receive their said rental value; that said Ray is insolvent, and has no property subject to execution out of which any judgment which the plaintiff might obtain for the rents and profits of said premises or damages for the detention thereof could be made; that her property, if any she has, consists almost wholly in moveables which are easily transferred from place to place, and that she is so unsettled as to endanger the plaintiff with respect to any judgment it might recover against her, and that unless an order be granted by the court restraining said Ray from collecting said rents, and appointing a receiver to collect and hold the same subject to the order of this court, the rents and
21 profits of said premises and the said rental value thereof are in great danger of being entirely lost to the plaintiff, and the plaintiff, by reason thereof, will sustain great and irreparable injury and damages, and for which it is without any remedy at law.

The plaintiff therefore prays the court, 1st, to grant a writ of injunction issueing out and under the seal thereof addressed to said defendant Ray, commanding her, her agents, servants, and employees to refrain and desist from receiving or collecting of any rents from said Steel, Mill, Jones, Kneeland, O'Brien, Maroney, Enfield, and Thomas, or any person or persons, as tenants of said Ray, or otherwise, until the further order in the premises of this court.

2nd. That a receiver be apppointed by the court to take possession of and rent said premises, and to collect and receive all the rents and profits of said premises, and keep and dispose of the same as the court shall order, and that said Steel, Mill, Jones, Kneeland, O'Brien, Maroney, En-
22 field, and Thomas, and all other occupants of said premises be ordered to pay said rents to said receiver.

3rd. That in the final hearing of this cause said injunction shall be made perpetual, and such other and further relief as to the court shall seem meet and proper.

THOMSON, HEREFORD & SAYER,
Att'ys for Pl'ff.

STATE OF COLORADO,
County of Lake, ss:

George A. Hynes, being duly sworn, on oath deposes and says that he is the agent and superintendent of the St. Louis Smelting and Refining Company, the plaintiff in the above-entitled cause; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge except as to those matters which are therein stated on his information or belief, and as to those matters he believes it to be true.

GEORGE A. HYNES.

Subscribed and sworn to before me this 14 day of May, A. D. 1879.
[L. S.] J. H. CLEMES,
Notary Public.

23 (Endorsed) 115. St. Louis Smelting & R. Co. vs. Sarah Ray et al. Prayer for injunction and application for receiver. Filed May

15th, 1879. Chas. W. Taylor, clerk. Thomson, Hereford & Sayer, pl'ff's att'ys.

Demurrer.

STATE OF COLORADO,
County of Lake, ss:

In the district court of the 4th judicial district of Colorado, in and for the county of Lake.

ST. LOUIS SMELTING & REFINING COMPANY, pl'ff, *vs.* SARAH RAY ET AL. } G. D. 115. G.

Now come said defendants and demur to the application of plaintiffs herein for an injunction and receiver for the reasons following, to wit: That the same does not state facts sufficient to entitle the plaintiff to the relief asked for in this, to wit:

1st. That there is no equity in said application.

24 2nd. That the same shows that plaintiff has an adequate remedy at law.

3rd. That the same states no facts showing that any irreparable injury is liable to occur to the property in defendants' possession.

4th. That the same does not show that plaintiff has any equitable interest in said property.

YATES & PARKS,
Atty's for Defendants.

(Endorsed:) G. D. 115. St. Louis S. & R. Co. vs. Sarah Ray et al., def'ts. Demurrer. Filed May 19, 1879. Chas. W. Taylor, clerk. Yates & Parks, def'ts' att'ys.

STATE OF COLORADO,
County of Lake, ss:

In the district court of the fourth judicial district, held within and for said county of Lake.

25 *Petition for removal of cause to the United States circuit court, district of Colorado.*

THE ST. LOUIS SMELTING AND REFINING COMPANY, plaintiff, *vs.* SARAH RAY, J. STEEL, J. MILL, A. M. JONES, Kneeland, J. O'Brien, J. T. Maroney, Enfield and Thomas, defendants. } H.

To the the honorable the said district court:

The petition of Sarah Ray, J. Steel, J. Mill, A. M. Jones, H. Knee-

land, J. O'Brien, J. T. Maroney, Enfield, Thomas, above-named defendants, respectfully shows to this honorable court that the matter and amount in dispute in the above-entitled suit exceeds, exclusive of costs, the sum or value of five hundred dollars ($500.00).

That the controversy in said suit is between citizens of different States, and that the said petitioners were at the time of the commencement of this suit and still are citizens of the State of Colorado, and that said plaintiff, the Saint Louis Smelting and Refining Company, at the time of the com-
26 mencement of this suit was and still is a citizen of the State of Missouri, being a foreign corporation organized under and by virtue of the laws of the State of Missouri, having its main office or place of business in the city and county of Saint Louis, and State of Missouri aforesaid, and your petition's offer herewith a bond with good and sufficient security for their entering in said circuit court of the United States, on the first day of its next session, a copy of the record in this suit and for paying all costs that may be awarded by said circuit court, if said court shall hold that this suit was wrongfully or improperly removed thereto.

Your petitioners therefore pray this honorable court to proceed no further therein, except to make the order of removal required by law and to accept the said surety and bond, and to cause the record herein to be removed into the said circuit court of the United States in and for the district of Colorado; and your petitioners will ever pray, &c.

YATES & PARKS,
Attorneys for Petitioners.

27 STATE OF COLORADO,
Lake County, ss:

Daniel E. Parks, being duly sworn, says he is one of the attorneys for the petitioners in the above-entitled cause and petition; that he has read the said petition and knows the contents thereof, and that the statements and allegations therein contained are true as he verily believes.

DAN'L E. PARKS.

Subscribed by the said Dan'l E. Parks in my presence, and by him sworn to before me, this 20th day of May, A. D. 1879.

[L. S.] CHAS. W. TAYLOR,
Clerk Dist. Court.

(Endorsed:) G. D. 115. St. Louis Smelting and Refining Company, pl'ff, vs. Sarah Ray et al., def'ts. Petition for removal of cause to U. S. circuit court. Filed May 20th, 1879. Chas. W. Taylor, clerk.

I.

Know all men by these presents that Sarah Ray, as principal,
28 and *and* Thomas Kemp, as sureties, are held and firmly bound unto the St. Louis Smelting and Refining Company in the penal sum of five hundred dollars, lawful money of the United States of America, for the payment whereof well and truly to be made unto the said St. Louis Smelting and Refining Company, heirs and assigns and successors, we bind ourselves, our and each of our heirs, representatives, and assigns, jointly and severally, firmly by these presents. Yet, upon these conditions, the said

Sarah Ray and others, having petitioned the district court of Lake County, State of Colorado, for the removal of a certain cause therein pending wherein the St. Louis Smelting and Refining Company, plaintiff, and Sarah Ray and others are defendants, to the circuit court of the United States in and for the district of Colorado: Now, therefore, if the said Sarah Ray and others, your petitioners, shall enter in said circuit court, of its next session, a copy of the record in said suit, and shall well
29 and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold the suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise to remain in full force and virtue.

Witness our hands and seals this 19th day of May, A. D, 1879.

SARAH RAY. [SEAL.]
THOS. KEMP. [SEAL.]
P. J. McCLEARY. [SEAL.]

STATE OF COLORADO,
Lake County, ss:

Thomas Kemp & Patrick J. McCleary, sureties in the foregoing and annexed bond, being severally duly sworn, severally depose and say, each for himself says, that he is a resident and property holder of said county and State, that he signed the said and is worth the amount of the penalty thereof over and above all his just debts and liabilities besides his property exempt by law from execution.

Subscribed and sworn to before me this 19th day of May, A. D. 1879.

THOS. KEMP.
30 P. J. McCLEARY.
CHAS. W. TAYLOR,
Clerk Dist. Court Lake County, Colo.

(Endorsed:) 115. The Saint Louis Smelting and Refining Company, pl'ff, vs. Sarah Ray et al. Bond on removal to U. S. circuit court. Filed May 20th, 1879. Chas. W. Taylor, clerk.

* * * Fee bill not copied herein.

(Endorsed:) 346. The St. Louis Smelting and Refining Company vs. Sarah Ray et al. Transcript from district court of Lake County, Colo. Filed Oct. 7, 1879, (S'gd) Edward F. Bishop, clerk. Presented by Patterson for def'ts.

And thereupon, on the same day, to wit, the 7th day of October, A. D. 1879, came the said defendants, by Markham, Patterson and Shannon, specially for this motion, and files herein their motion to strike
31 cause from docket, in court and in said cause; and said motion is in words and figures as follows, to wit:

Motion to strike cause from docket.

In the circuit court of the United States in and for the district of Colorado.

ST. LOUIS SMELTING AND REFINING COMPANY
vs.
RAY ET AL.

Comes now defendants, by their attorneys, and appearing for the purposes of this motion only, and for none other, move the court to strike the same from the docket of this court.

In support of this motion, defendants, by their attorneys, show unto your honor that upon the 20th day of May, A. D. 1879, the said cause was pending in the district court of the fourth judicial district of Colorado, in and for Lake County. That on the same day a petition was filed praying a removal of this cause to the circuit court of the United
32 States in and for the district of Colorado, the prayer of which petition was granted, and a bond filed in accordance with the order of the court. That the plaintiffs in said cause without the privity, knowledge, or consent of the defendants procured the record of said cause from the clerk of the district court of the 4th judicial district of Colorado, in and for Lake County, and filed the same with the clerk of this court, and caused the said cause to be docketed in this court without the knowledge or consent of defendants.

MARKHAM, PATTERSON & SHANNON,
Att'ys for Defendants.

STATE OF COLORADO,
County of Arapahoe:

Henry W. Shannon, being duly sworn, deposes and says that he is the agent and attorney of the defendants in the above cause; that neither of the said defendants are within the county of Arapahoe, and for that reason he makes this affidavit; that he knows the contents of the foregoing
33 motion, and that the facts therein set forth are true of his own knowledge.

(S'g'd) HENRY W. SHANNON.

Subscribed and sworn to before me this seventh day of October, A. D. 1879.

[NOTARIAL SEAL.] (S'g'd) WILLIAM M. MAGUIRE,
Notary Public.

(Endorsed:) No. 346. Circuit court U. S. St. Louis Smelting and Refining Company vs. Ray et al. Motion to strike cause from the docket. Filed Oct. 7, 1879. (S'g'd) Edward F. Bishop, clerk. Markham, Patterson & Shannon, attorneys for defendants.

And afterwards, and on, to wit, the 8th day of October, A. D. 1879, the same being one of the regular juridical days of the October term, A. D. 1879, of said court, present the honorable Moses Hallett, district judge, the following proceeding was had and entered of record in said court and in said cause, to wit:

Order: Motion to strike denied.

THE SAINT LOUIS SMELTING AND REFINING Company *vs.* RAY, JOHN STEEL, ET AL. } For possession, &c.

From district court, Lake County.

34 At this day comes the said plaintiff, by W. S. Decker, esq., its attorney; and the said defendants, by T. M. Patterson, esq., their attorney, for the purpose of this motion only, also come.

And the motion of the said defendants to strike this cause from the docket of the court coming on now to be heard, and the court being now sufficiently advised in the premises,

It is ordered by the court, for good and sufficient reasons to the court appearing, that the said motion be denied.

And afterwards, and on, to wit, the 11th day of October, A. D. 1879, the same being one of the regular juridical days of the October term, A. D. 1879, of said court, present the honorable Moses Hallett, district judge, the following proceeding was had and entered of record in said court and in said cause, to wit:

Motion to retax transcript denied.

THE SAINT LOUIS SMELTING AND REFINING Company *vs.* RAY, JOHN STEEL, ET AL. } For possession, &c.

From district court, Lake County.

35 At this day comes the said plaintiff, G. G. Symes, esq., its attorney, and the said defendants, by T. M. Patterson, esq., their attorney, also come.

And the motion of the said defendants (heretofore filed in cause numbered 344 in this court) for a rule on the said plaintiff requiring it to repay to the said defendants the amount expended by them in procuring a copy of the record and proceedings heretofore had herein in the district court of Lake County, coming on now to be heard, is argued by counsel, and the court being now sufficiently advised in the premises,

It is ordered that the cost of the transcript heretofore filed by the said plaintiff herein and the filing thereof be not recoverable, and that the cost of the transcript filed by the said defendants be taxed in this cause to abide the event of the suit.

And afterwards, and on, to wit, the 16th day of October, A. D. 1879, the same being one of the regular juridical days of the October term,
36 A. D. 1879, of said court, present the honorable Moses Hallett, district judge, the following proceeding was had and entered of record in said court and in said cause, to wit:

Order: Defendants to answer in six days.

THE SAINT LOUIS SMELTING AND REFINING Company
vs.
RAY, JOHN STEEL, ET AL.
} For possession, &c. from dist. court, Lake County.

At this day comes the said plaintiff, by G. G. Symes, esq., its attorney, and on its motion it is ordered that the said defendants answer herein on or before Wednesday next, the 22d instant.

And afterwards, and on, to wit, the 1st day of November, A. D. 1879, came again the said plaintiff, by its attorneys aforesaid, and filed in said court and in said cause its replication to the complaint heretofore filed herein. And the said replication is in words and figures as follows, to wit:

Replication to answer.

In the circuit court of the United States for the district of Colorado, in the 8th circuit.

37 THE SAINT LOUIS SMELTING AND REFINING Company, pl'ff,
vs.
RAY, JOHN STEEL, JOHN MILL, A. M. Jones, Henry Kneeland, J. O'Brien, J. T. Maroney, Enfield, Thomas, def'ts.
} No. 346.

The plaintiff replies to the answer of defendants, Ray, Steel, Mill, Jones, Kneeland, O'Brien, and Maroney, herein:

I. Plaintiff denies that it is incompetent to acquire title to real estate or to hold or possess real estate in the State of Colorado except such as may be necessary or requisite for the transaction of its business as a smelting and refining company; and plaintiff alleges that it is authorized under and by virtue of the statutes of the State of Missouri and its incorporation certificate, and under and by virtue of the statute of the State of Colorado, it was at the times mentioned in the complaint in this action, and ever since has been and now is lawfully competent, authorized, and
38 empowered to buy, sell, and hold and deal in, for any purpose whatever, all kinds of lands, mining property, and real estate.

II. And plaintiff denies that the real estate described in the complaint and answer herein was not at the time it was purchased and became the property of plaintiff necessary or requisite to the said company for the transaction of its business; and the plaintiff alleges that at the time it contracted for and purchased the said real estate it did so for the sole and only purpose of erecting smelting and reducing works thereon, and that in pursuance of such intention it built a large and valuable smelting and reducing works, known as the Harrison Reduction Works, upon the property mentioned and described in the complaint herein, and has ever since carried on the business of reducing and smelting silver ores in the said works upon said property. That at the time the plaintiff contracted to

purchase the said property and proceeded to and did erect the said
39 smelting and reducing works thereon, said property was necessary and useful for the purpose of carrying on the said smelting business, and there was not at said time any person or persons living upon or near the said real estate.

III. Plaintiffs for further reply denies that it purchased or acquired the title to the said real estate for the purpose of trading, selling, or speculating with the same, but alleges that it purchased it as aforesaid for the sole and only purpose of carrying on its said reducing and smelting business.

(S'g'd) THOMSON & SAYER,
" SYMES & DECKER,
Pl'ff's Att'ys.

(Endorsed:) No. 346, U. S. C. C. St. L., S. & R. Co. vs. Ray, John Steel, et al. Replication. Filed Nov. 1, 1879. (S'g'd) Edward F. Bishop, clerk. G. G. Symes, for pl'ff.

And afterwards and on, to wit, the 15th day of June, A. D.
40 1880, the same being one of the regular juridical days of the May term, A. D. 1880, of said court, present the honorable Moses Hallett, district judge, the following proceeding was had and entered of record in said court and in said cause, to wit:

Order: Default vs. Enfield and Thomas.

THE SAINT LOUIS SMELTING AND REFINING Company
vs.
SARAH RAY, JOHN STEEL, ET AL.

For possession of specific real property and for damages. From district court Lake County.

At this day comes the said plaintiff by G. G. Symes, esq., its attorney, and thereupon comes T. M. Patterson, esq., attorney, and withdraws his appearance and that of V. D. Markham, esq., C. S. Thomas, esq., and E. L. Campbell, esq., on behalf of the said defendants, Ray, Steel, Mill, Janes, Kneeland, O'Brien, and Maroney.

And thereupon the said plaintiff moves the court for judgment of default againt the said defendants Enfield and Thomas; and it now appearing to the court, that the said defendants Enfield and Thomas have hitherto wholly failed to answer herein as by the order of the court they were required to do, therefore it is ordered that the default of the said
41 defendants Enfield and Thomas be taken and entered of record.

And afterwards and on, to wit, the 26th day of June, A. D.
42 1880, came again the said plaintiff by its attorneys aforesaid, and filed in said court and in said cause its motion for a new trial of the issues herein, and the said motion is in words and figures as follows, to wit:

Motion for new trial.

In the circuit court of the United States for the district of Colorado, in the 8th circuit.

THE ST. LOUIS SMELTING AND REFINING COMpany
vs.
SARAH RAY, JOHN STEEL, ET AL.

And now comes the plaintiff company by its attorneys aforesaid, and moves the court to set aside the verdict rendered, and grant a new trial in this cause.

And for grounds of this motion the plaintiff company shows to the court the following reasons, to wit:

I. The court admitted on the trial of this action improper evidence on the part of the defendants. That is to say the court admitted in
43 evidence an exemplified copy of the proceedings from the Commissioner of the General Land Office, which included all the proceedings from the survey and application for patent to the Starr placer claim and tract up to the time of the entry and issuing of the said Starr patent.

II. The court improperly admitted evidence tending to impeach and attack and set aside the patent title outside of the patent.

III. The court improperly gave to the jury the following charge and instruction, viz: "It appears by the evidence before you that the location upon which the patent was issued, under which plaintiff claims, is made up of the several locations of earlier date, some of which were made prior to July, 1870, and others since that time. Upon the facts as stated, the location is to be regarded as a single location of the date of the survey and embraces more than 160 acres of land; as at that time a single claimant was not by law allowed to take more than 160 acres of land, the
44 title for this reason fails, and your verdict should be for the defendants.

(S'g'd)

C. I. THOMSON,
G. G. SYMES, &
H. C. THATCHER,
Att'ys for Plff's.

(Endorsed:) 346. Circuit court U. S. St. Louis S. & R. Co. vs. Ray, Steel, et al. Motion for new trial. Filed Jun' 26, 1880. (S'g'd) Edward F. Bishop, clerk. G. G. Symes, pl'ff's att'y.

And afterwards, and on, to wit, the 2nd day of July, A. D. 1880, the same being one of the regular juridical days of the May term, A. D. 1880, of said court—present, the honorable James M. Love, district judge for the district of Iowa assigned—the following proceeding was had and entered of record in said court and in said cause, to wit:

Order: Motion for new trial denied.

THE ST. LOUIS SMELTING AND REFINING COMPANY
vs.
SARAH RAY, JOHN STEEL, JOHN MILL, A. M. Janes, Harry Kneeland, J. O'Brien, J. T. Maroney, Enfield, Thomas.

For possession of specific real property and for damages. From district court, Lake County.

45 At this day comes the said plaintiff, by G. G. Symes, esq., its attorney.

And the motion of the said plaintiff for a new trial of the issues herein coming on now to be heard, and the court being now sufficiently advised in the premises:

It is ordered by the court, for good and sufficient reasons to the court appearing, that the said motion be denied.

Wherefore it is considered by the court that the said defendants go hence without day and have and recover of and from the said plaintiff their costs, by them in this behalf laid out and expended, to be taxed, and have execution therefor.

And afterwards, and on, to wit, the 7th day of July, A. D. 1880, the same being one of the regular juridical days of the May term, A. D. 1880, of said court—present, the honorable Moses Hallett, district judge—the following proceeding was had and entered of record in said court and in said cause, to wit:

46 *Order: New trial granted.*

THE SAINT LOUIS SMELTING AND REFINING COMPANY
vs.
SARAH RAY, JOHN STEEL, ET AL. } 346.

For possession of specific real property and for damages.

At this day comes the said plaintiff, by G. G. Symes, esq., its attorney, and moves the court to vacate the judgment had herein, and for a second trial of the issues herein.

And it appearing to the court that the taxed costs of the said defendants have been fully paid and discharged, therefore—

It is ordered that the judgment of the court lately and on the 2nd instant had herein, be vacated and for naught held, and that a second trial of the issues herein be had, in pursuance of the statute in such case made and provided.

And afterwards, and on, to wit, the 2nd day of May, A. D. 1882, the same being one of the regular juridical days of the May term, A. D. 1882,

of said court—present, the honorable Moses Hallett, district judge
47 the following proceeding was had and entered of record in said court and in said cause, to wit:

Defendants granted leave to file amended answer.

THE ST. LOUIS SMELTING AND REFINING COMPANY
vs.
SARAH RAY, JOHN STEEL, ET AL.

For possession, &c. From dist. c't, Lake Co.

At this day come the said defendants, by T. A. Green, esq., their attorney, and, on their motion, it is ordered by the court that the said defendant' have leave to file herein an amended answer as they shall be advised.

And afterwards, and on, to wit, the 19th day of May, A. D. 1882, came again the said plaintiff, by its attorney aforesaid, and filed in said court and in said cause its demurrer to last amended answer; and the said demurrer is in words and figures as follows, to wit:

Demurrer to last amended answer.

UNITED STATES OF AMERICA,
District of Colorado, ss:

48 In the circuit court of the United States in and for the district of Colorado, in the eighth circuit.

THE ST. LOUIS SMELTING AND REFINING Company, plaintiff,
against
S. RAY, STEEL, ET AL., DEFENDANTS.
Demurrer.

The said plaintiff company demurs to that portion of the second and last amended answer of the said defendants, filed herein and called the defendants' second defense, containing all that portion of said answer setting up new and affirmative matter as a defense, and also to that portion called a counter-claim, and for grounds of demurrer alleges:

That the said portion of the said answer does not state or allege any facts sufficient to constitute a defense to the cause of action set forth in the complaint.

That said answer admits that the plaintiff is seized of a title in fee through a patent for the said grounds from the United States, and the sup-
49 posed matters of defense set forth in said portion of said answer, and which allege superior possessory title in the defendants, and allege the location of a town-site on the public domain; and allege that said land was reserved from sale by act of Congress, and that the said Thomas Star was an alien, and not a citizen of the United States, constitute in law no defense; nor do either or any of said matters constitute any defense to the cause of action and matters set forth in the said complaint in this action.

That it does not appear that the improvements for which a counter-claim is alleged in said answer, were made and put upon said real estate since the passing of the act of the legislative assembly, approved February 2nd, 1881, entitled "An act to amend section 240 of the code of civil procedure."

SYMES & FOOT, AND
THATCHER & GAST,
Att'ys for Pl'ff.

50 (Endorsed:) 346. St. Louis S. & R. Co. v. S. Ray, Steel, et al. Demurrer to last amend. ans. Filed May 19, 1882. (S'g'd) Edward F. Bishop, clerk. Symes & F., & T. & G., att'ys for pl'ff.

And afterwards, and on, to wit, the 6th day of June, A. D. 1882, came again the said defendants, by their attorneys aforesaid, and filed in said court and in said cause their third amended answer to the complaint heretofore filed herein. And the said amended answer is in words and figures following, to wit:

Third amended answer.

50½ In the United States circuit court for the district of Colorado, May term, A. D. 1882. Ejectment. Answer. 3' amended answer.

UNITED STATES OF AMERICA:

THE ST. LOUIS SMELTING & REFINING COMPANY, plaintiff,
vs.
SARAH RAY ET AL., DEFENDANTS.

Defendants deny that the said plaintiff was, at the commencement of said action, or at any other time prior thereto or since, the owner of or entitled to the possession of said premises mentioned and described in said complaint, or any part thereof or any interest therein.

Deny that said defendants did at the time alleged in said complaint or at any other time wrongfully enter upon said premises and unlawfully and wrongfully oust the said plaintiff from the same, as alleged in said complaint.

Deny that said defendants wrongfully withholds said premises from said plaintiff; and den' that said plaintiff has been damaged by the said alleged ouster and wrongfully withholding of said premises from plaintiff or either in the sum alleged in said complaint or any other sum.

Deny that said premises are worth the sum of rents and profits alleged in said complaint.

II. DEFENSE.—And for a further defense in this behalf and to this action defendant states that they are the owners of said premises mentioned and described in said complaint by superiority of possessory title and priority of actual possession of the same as a part of a town site on the public domain of the United States, and more fully set forth as follows, to wit:

That said town site was first selected and located on the unoccupied, unclaimed, and vacant public domain of the United States about the 1st of June, A. D. 1860, and was laid off into public streets, alleys, and squares,

and into lots and blocks, at the date aforesaid, and was at said date under the control of a regularly organized and legally established city government, and was called the town of Agassiz; that said town continued to exist and contained from 500 to 3,000 population, up until about A. D. 1873, when the name of said town was changed to Leadville.

That from the date last aforesaid the said town of Leadville built up and increased in population very rapidly until the time of the commencement of this action, and contained during all of said time from 5,000 to 16,000 population, and included within its limits over six hundred acres of land, all of which was selected from the unoccupied, vacant, and unclaimed public domain of the United States, and was duly selected, set apart, and occupied, and possessed and used as a town site from about the said first day of June, A. D. 1860, continuously up to the commencement of this suit, and is still so used, possessed, and occupied.

That said town site has during all of said time since the aforesaid first day of June, 1860, been duly surveyed and laid off into public streets, alleys, and grounds, and into lots, and blocks and additions, and has been duly incorporated from said date as a town or city, first under the laws of the Territory of Colorado, and afterwards under the general incorporation laws for towns and cities of the State of Colorado; and has during all of said time been under the control of a regularly organized city government, consisting of a mayor, city council, city treasurer, assessor, collector, attorney, and other city officers, and a well organized police force and fire department, and the lots and property in said town or city have been duly assessed and taxes collected to support said city government, and also for county and State purposes during all of said time since the said first day of June, A. D. 1860, up to the present time; and said city has incurred large indebtedness and expended large sums of money during all of said time in the improvement of streets, alleys, and public grounds, and in erecting school-houses and other necessary public buildings for city purposes; and that individuals have expended during all of said time since the selection of said town site immense sums of money in building furnaces, smelters, sample works, manufactories, shops, stores, warehouses, hotels, livery and other stables, banks, theaters, and dwellings; and the people of said city have during all of said time since the location of the same spent large sums of money in building churches, hospitals, and other charitable institutions; and the said county of Lake, in the said State of Colorado, in which said city of Leadville is situated, did, on or about the first day of January, A. D. 1875, make said city of Leadville the county seat of said county, and said county has spent large sums of money in erecting a large and substantial court-house and jail and in other necessary improvements in and about the same.

That the said premises in question, and mentioned and described in said complaint as certain lot in said city of Leadville, is now and has been during all of said time since the selection and location of said town site, to wit, the first day of June, A. D. 1860, a part of said town site and included within the limits of the same; and the said defendants and their grantors have been in the actual, exclusive, and peaceable possession of the same during all of said time, and have during that time made valuable improvements and erected valuable buildings on said premises, and have, under the laws of Congress and the laws of Colorado, acquired a

51, 52 good title to and vested rights in said premises; and defendants' said right to said premises has been quieted by the statutes of limitation of the State of Colorado by the peaceable and quiet possession of said premises in good faith under claim of title and payment of all taxes assessed against the same for more than five years next before the commencement of this suit.

Defendants further state, that all of the land now included within the limits of the said city of Leadville, and of which the premises in question form a part, was, to wit, on the first day of June, A. D. 1860, selected as a town site on the public domain of the United States, and has from that date to the present time been used, occupied, and possessed for the sole purpose of a town site, and all of said land has been actually settled and occupied for purposes of trade and business, and not for agriculture; and has been wholly reserved from sale by the laws of Congress, and the land department of the government and its officers have had no jurisdiction or authority to sell the same for either mining or agricultural purposes; and defendant states that said land is neither mineral nor agricultural land, and is of no value at all for any purpose except a town site, but that said land is a natural and necessary town site for the large and valuable mines and mining belt just east of said town or city, and in its immediate neighborhood; that it is an absolutely necessary center of trade, business, and commerce for said mines and mining region, and was selected, used, and occupied as such center of trade and town site long prior to any claim or pretended claim plaintiff or its grantors, or any one else had, to said town site or said premises in question, and was then, and always has been reserved from sale by the laws of Congress.

That the only color or pretense of title which plaintiff makes to the premises in question is derived from a void patent issued by the officers of the land department to lands reserved from sale by the laws of Congress, to one Thomas Star, who was an alien and not a citizen of the United States, and who had not before, or at the time he applied for said patent, declared his intention to become a citizen of the United States; and that said patent was so issued to said reserved lands to said alien on the 29th day of March, A. D. 1879, for $164\frac{61}{100}$ acres of land, all of which was included within the limits of the said city of Leadville, which was at that time, and had been a long time prior thereto, an incorporated town or city under the laws of the State of Colorado, and all of the land included in said void patent had been selected, used, occupied, and possessed as a town site, and settled and occupied for the purposes of trade and business, and not for agricultural purposes, long prior to the pretended location of any of the mining claims included in said void patent, to wit, on the first day of June, A. D. 1860; that the said Thomas Starr was born in the county of Tyron, in Ireland, of parents who were foreigners and subjects of Great Britain, and who never became citizens of the United States, and that during all of the time from the said first day of June, 1860, up to about the 18th day of March, 1878, the date of the application for said void patent, the said Thomas Starr was an alien who had not declared his intention to become a citizen of the United States, and who could not legally locate said mining claims included in said void patent, or legally purchase the same, or hold any possessory right to the same so as to prevent said land included in said patent from being duly selected, used, occupied, and possessed as a town site, or actually settled and occupied for

the purposes of trade and business; and that the said alien, Thomas Starr, could acquire no rights under the mining laws of Congress, or the laws of the State of Colorado, during said period of time, to prevent said land from being selected and set apart and used, occupied, and possessed as a town site, and for trade and business, and the officers of said land department had no jurisdiction at the time of issuing said patent, to wit, on the 29th day of March, A. D. 1879, to issue the same to said alien or any one else; that at that date all of the land included within the limits of the said city of Leadville, and of which the premises in dispute in this action were a part, was wholly reserved from sale by the laws of Congress, and, therefore, said patent is void.

53 III. DEFENSE.—And for a further defense in this behalf these defendants state that they are the owners of the premises in dispute by virtue of prior, actual, and exclusive possession of the same as a part of a town site on the public domain of the United States, as fully set forth in the above and second defense in this answer, which said defense is hereby referred to and made a part of this defense, to show fully the facts constituting defendants' possessory title to said premises, and the alienage of said Starr, and for all purposes of this defense; that all of the right or title claimed by the plaintiff company to the premises in question is derived from a certain mineral patent for $164\frac{61}{100}$ acres of mining ground, obtained by Thomas Starr from the Government of the United States on the 29th day of March, A. D. 1879.

And defendants further state that said Thomas Starr combined and confederated with one Edwin Harrison, president of plaintiff company, and one August Myers, a member of and general manager of said company, and other officers of the same, to obtain said mineral patent from the government by collusion, fraud, bribery, perjury, and subornation of perjury, and to commit a gross fraud upon these defendants and all other bona fide settlers on said lots and town site, and upon the mining laws of Congress and upon the Government of the United States, as hereinafter set forth.

That the said August Myers pretended to have located a placer mining claim on said town site on the 24th day of August, 1877, containing $31\frac{61}{100}$ acres of the land included in said patent, which said Myers afterward sold, or pretended to sell, to said Starr.

That said Starr, Myers, and Harrison entered into an agreement whereby they consolidated said pretended claim of $31\frac{61}{100}$ acres with certain pretended placer claims of said Starr, making in all $164\frac{61}{100}$ acres, for which said patent was obtained in the name of Thomas Starr.

That in consideration of the said combination and conspiracy the said Starr agreed with said Myers and Harrison, acting for plaintiff company, that in case said Myers and Harrison, and other officers of said company, would assist him to obtain said patent in the manner hereinafter mentioned, he would convey the said $31\frac{61}{100}$ acres of said land to said plaintiff company whenever said Starr should obtain said patent, which said Starr did, and the premises in question in this action are a part of the said $31\frac{61}{100}$ acres so conveyed by said Starr to plaintiff.

That all of said placer mining claims were pretended and fraudulent, and the said conspirators had secret surveys made of the same, upon and including said town site, or a large and valuable portion thereof, the said

$164\frac{61}{100}$ acres all being within the same, and including land wholly used as a town site and occupied for that purpose, and including the improvements on the same, made by defendants and other settlers, worth more than one million dollars.

That in order to obtain said patent it was necessary for said Starr to commit perjury as to every material allegation of his application, and to bribe and suborn other witnesses to commit the crime of perjury.

That in pursuance of said conspiracy to obtain said patent for said $164\frac{61}{100}$ acres of said town site the said Starr, with the knowledge and consent of plaintiff company, committed the crime of willful and corrupt perjury in this, to wit: that said Starr did, on the 15th day of March, A. D. 1878, at the county of Lake and State of Colorado, make oath to his application for said patent before C. E. Anderson, a notary public within and for the said county and State, and within the Fairplay land district, in the said State of Colorado, and who was duly authorized to administer such oaths, that he, the said Thomas Starr, was a citizen of the United States, when in truth and in fact the said Thomas Starr was an alien and subject of Great Britain, who had never declared his intention to become a citizen of the United States, and then and there willfully and corruptly committed the crime of perjury in order to obtain said patent to said land and town site.

That the said Thomas Starr, at the same time and place and before the same officer, also committed the crime of willful and corrupt perjury in this, to wit: said Starr made oath that he was the owner of and in the actual, quiet, and undisturbed possession of said land included in said patent, and that he was entitled to the possession of the same, being $164\frac{61}{100}$ acres, when in truth and in fact he was not, and never was, in the actual possession of the same, or any part thereof, and was never the owner of the same, or any part thereof, or entitled to the possession of the same or any part thereof; that said Starr also made oath, at the same time and place, that himself and grantors had worked said claim more or less every year since 1861, and had done work and made improvements on said claim to the value of $20,000, when in truth and in fact neither the said Starr nor any of his grantors ever expended one dollar on said claim at any time, or ever owned said claim or any part thereof, and that said Starr committed willful and corrupt perjury as to this allegation in said application for said patent, and that said Starr willfully and corruptly perjured himself in regard to every material allegation in the said application for said patent.

That said Starr also, in order to obtain said patent, bribed and suborned one Hiram C. Vaughn and one David Houghton to commit willful and corrupt perjury, at the same time and place and before the
54 same officer, in this, to wit, the said Vaughn and Houghton made oath before said officer that they had been acquainted with the said consolidated mining claim, for which said Starr obtained said patent, since June 17, 1860; that said Starr and his grantors of said claim had been in the actual, notorious, and continuous possession of said claim since the said 17th day of June, 1860, and that said possession had been perfect during all that time, when in truth and in fact the said claim never had any pretended existence until about August, 1877, and neither the said Starr nor his grantors ever had any possession at all of said mining

claim or any part thereof, and that the land included in said patent was used, occupied, and possessed as a town site as aforesaid.

That said false affidavits were necessary to obtain said patent, and were used in said land office in support of said application for said patent by said Starr.

That under the general rules and regulations of the United States Land Office in regard to the issuing of all mineral patents, the officers of said Land Office are required to insert certain exceptions in each and all patents issued by said office of that kind, and that among said exceptions is the following one, to wit:

"Excepting and excluding, however, from these presents all town property rights upon the service, and there are hereby expressly excepted and excluded from the same all houses, buildings, lots, blocks, streets, alleys, or other municipal improvements on the surface of the above-described premises not belonging to the grantees herein, and all rights necessary and proper to the occupation, possession, and enjoyment of the same."

That the said Starr and plaintiff company, by false and fraudulent statements and representations to the officers of said Land Office that there was no town site on said land, and no surface improvements but what belonged to said Starr, and by the said false oath of said Starr, and the said false affidavits obtained of the said Vaughn and Houghton by subornation and bribery deceived and misled the officers of the United States Land Office, and induced them to believe that there was no town site upon the land included in said patent or any part thereof, and that the same was all owned and possessed by said Starr for mining purposes, and was purely mining ground, and that the same had all been so owned and occupied for mining purposes ever since the 17th day of June, 1860, up to the date of said application for said patent, March 18, 1878—about eighteen years—and thereby wrongfully and fraudulently induced the officers of the Land Office at Washington City to leave the said exception above mentioned out of the said patent when the same was issued to said Starr, and that said fraud, perjury, bribery, deceit, misrepresentation and falsehood were secretly used and practiced by said Starr and the said officers of the said plaintiff company upon the said officers of said Land Office at Washington City, and in said land district, to obtain said patent without the said town site exception being inserted in the same, for the purpose and with the intent of wronging and defrauding these defendants and other settlers out of their improvements on said lots and town site, and out of their possessory rights to said lots and town site.

That the improvements on the lots and premises in question in thi action, and made in good faith and under a bona fide claim of possessory title by defendants and their grantors, were and are of the value of $10,000, and the improvements by the other settlers on said land amounted to not less than $500,000 in value made by said settlers in good faith and as bona fide claimants of said lots and town site; and the whole value of said land and improvements on said town site at the date of said patent was not less than one million dollars.

That said Starr and his said confederates also falsely and fraudulently represented to the officers of said Land Office that said land was mineral land and valuable for mining purposes, and that said parties were patent-

ing said land wholly for mining purposes, when in truth and in fact the said land was of no value at all for mining purposes, and that said Starr and his said confederates and grantors had never done any mining at all on the same, and never have, up to this time, done any mining on said land; but said Starr and confederates patented said land wholly for the purpose of wronging and defrauding defendants and other settlers on the same out of their improvements aforesaid and out of their possessory rights to said lots, and also with the intention of wronging and defrauding the government out of said town site, and obtaining through fraud, perjury, and bribery, and subornation of perjury, as above alleged, the said land and all of the said improvements at the price of $2.50 per acre, when said land was worth to the government under the town-site laws of Congress from $100 to $10,000 per acre. Defendants therefore allege that said patent is wholly fraudulent and void as to defendants and other settlers on said town site and as to the Government of the United States.

55 IV. ESTOPPEL.—And for a further defense in this behalf these defendants state that they are the owners of the premises in question, and entitled to the possession of the same by virtue of prior, actual, and exclusive possession of the same as a part of a town site on the public domain of the United States, as alleged in the first defense set forth in this answer, and all of the facts alleged and set forth in the said second defense in regard to said town site are hereby referred to and made a part of this defense. That all of the right or title claimed by the plaintiff company to the premises in question is derived from a certain mineral patent for 164 61-100 acres of mining ground obtained by Thomas Starr from the Government of the United States on the 29th day of March, A. D. 1879.

And these defendants allege that the said Thomas Starr obtained the said placer mining patent under which plaintiff claims title in this action for a number of consolidated placer mining claims alleged by him to have been located from June 17, 1860, up to about June, 1877, and making in all 164 61-100 acres of pretended placer ground, all of which is included within the limits of the said town site and city of Leadville, as alleged in said 2 defense in this answer.

That the said Starr claims to have owned all of the placer mining claims included in said consolidated claim, for which said patent was issued, since the month of August, A. D. 1877, and his grantors since June 17, 1860; and these defendants state that said city of Leadville grew and increased in population from about five thousand people at that date to about twenty thousand people at the time said patent was issued, to wit, on the 29th day of March, A. D. 1879; and that the increase in the extent and value of the lots and improvements in said city was very great during that time, and that said city was being extended in every direction during said time; and that the said Thomas Starr, patentee, was living in said city during all of said time, and was present and witnessed all the improvements that were being made in said city, and the manner in which it was extending its limits, and the large sums of money that were being expended by said city for public improvements, and by these defendants and other settlers on said lots and land included in said patent; and the business buildings, furnaces, smelters, warehouses, banks, hotels, churches, dwelling houses,

and public buildings, amounting in the aggregate to over half a million dollars at least; and during all of said time the said Starr and his grantors stood by and not only intentionally and fraudulently kept quiet in regard to his and their claim of ownership to said mining claims, or any part thereof, or to any of the land on which said city was being built, but the said Starr combined and confederated with the said August Myers and Edwin Harrison, president of plaintiff company—which said company now claims to own and to have had a secret written contract with said Starr for the conveyance to said company of 31 61-100 acres of said land, including the premises in question—to stand by and secrete all of their claims to the ownership of said land, and to secrete all of their efforts and their intention to obtain a patent to the same; and never at any time, during all the time from August, 1877, up to the time of the application for said patent, made known to the city or to defendants, or to any of the settlers on said land, that the said Starr or the plaintiff company claimed or pretended to claim any possessory right or title whatever to said land or any part thereof, or that they or their grantors had ever located the same or any part thereof.

That the said August Myers, general manager of said plaintiff company, lived in said city of Leadville during all of said time, and claimed to have located 31 61-100 acres of said land, included in said patent, on the 24th day of August, A. D. 1877, and to have owned the same by virtue of said location, and to have consolidated the same in the said Starr claim for the purpose of being patented by said Starr, and which is the same land conveyed by said Starr to plaintiff company, and of which the premises in question in this action are a part; and the said Myers stood by during all that time, up to the 8th day of March, A. D. 1878, and witnessed from day to day during all of that time the said city, and these defendants and other settlers on said land, building up and improving said city and the part thereof located on said land, and their expending tens of thousands of dollars in such improvements; but never at any time, or in any manner, notified defendants or said city, or other settlers on said land, that said plaintiff company or himself, or said Starr, or any one else, had or made, or would ever make, any claim whatever to said land, or any part thereof; but intentionally and fraudulently secreted and concealed and suppressed such claim of possessory title to the same; and combined and conspired with said Harrison, president of said company, who was also present during all of said time, and with the said Starr, to suppress and conceal from defendants and other settlers on said town site and land all such claims, for the purpose and with the intention of allowing defendants and other settlers to go on and expend their money in building up said city and making valuable improvements on said lots, with the intention of obtaining said patent, and thereby wronging and defrauding defendants and other bona fide settlers on said lots not only out of their possessory right and title to the same, but also out of all of said improvements. That up to the date of said application for said patent, these defendants had in good faith expended the sum of $5,000 in erecting buildings and making valuable and necessary improvements on the premises in question in this action, under a bona fide claim of possessory title to said premises as a
56 part of a town site on the public domain of the United States; and that up to that date defendants had no notice whatever that said

Starr, or Myers, or Harrison, or plaintiff company had or made any claim whatever to said premises, or said land or lots on said town site. That there was no mining ever done on said land, and there were no notices or anything thereon to lead defendants or other settlers on the same to suppose or believe that the same was ever located by any one as mineral land; but, on the contrary, said land was appropriated and occupied wholly as a town site and for purposes of business and trade, and for smelters and manufacturing purposes, and for nothing else; and that the said city itself, and all the inhabitants of the same, acted upon the belief and supposition that the same was a town site, and that the possessory titles to said lots were good and valid, and defendants and other settlers made all of their said improvements on the same believing that their said titles were good. That said Starr only published his notice for said patent in a weekly paper in said city of Leadville, and had the surveyor make out the description of said consolidated placer claim in such manner that no one but a skilled surveyor could tell where said land was situated, except that it was in the county of Lake and State of Colorado; that said notice was intentionally and fraudulently published in that manner, so as really to give defendants and other settlers no notice at all that said application for said patent contained any land at all either in or near the city of Leadville.

That the said Myers and Harrison, as officers of plaintiff company, also conspired and confederated with said Starr to induce the officers of the land office to issue said patent without inserting the exception as to a town site and surface improvements, mentioned and set out in the above second defense in this answer, which exception, and all the facts connected with the same, as set forth in said second defense, are hereby referred to and made a part of this defense, and all of the facts alleged in said second defense necessary to make this defense perfect are hereby referred to and made a part of this defense.

That said Starr and his said coconspirators wholly secreted from defendants and other settlers on said land and lots all of their efforts and intention to obtain said patent until their notice was published, and even then they still secreted their actions all they possibly could, and wholly concealed and secreted the fact that they were making an effort to obtain a mineral patent, with the said exception as to a town site and surface improvements, above mentioned, left out; and that the said Starr and his said coconspirators stood by all the time they were obtaining said patent, from the 8th day of March, A. D. 1878, to the 29th day of March, A. D. 1879, the date of said patent, and witnessed from day to day these defendants and their grantors, and the other settlers on said lots and land included in said patent, expending tens of thousands of dollars in making improvements on said lots and town site, and in building up said city of Leadville, and thereby increasing the value of all kinds of real property in the same, and never in any manner warned or notified defendants and other settlers on said land and town lots that they were obtaining a mineral patent from the Government of the United States, with said exception as to surface improvements left out, or otherwise, and which would enable said Starr and said plaintiff company to set up an absolute legal claim to the whole surface ground included in said mineral patent, and to all of the improvements made on the same by defendants and other settlers, as well as by said city itself; but, on the contrary, the said Starr and the said Myers and

Harrison, by themselves and by and through A. P. Hereford, their agent and attorney, after defendants and other settlers found out by other means than said notice that the same included land situated in said city and on said town site, assured defendants and other settlers on said lots and land, after the notice for said patent was published, that in case said patent should be obtained that neither defendants nor any of the settlers on said lots would be disturbed or interfered with in their rights and possession, and that at most only a nominal sum would be expected or demanded of defendants and other settlers on said town site, and in no case to exceed $25 per lot, to assist in paying the necessary expenses of obtaining said patent, and advised defendants and other settlers as aforesaid to go on making their improvements and expending their money in building up said city; and defendants allege that said parties and plaintiff company caused said false and fraudulent reports and assurances to be circulated among said settlers to induce them all to continue making said improvements, and that defendants and others continued erecting buildings on said lots and making improvements on the same until said Starr obtained said patent, on the 29th day of March, 1879, and did so relying on said false and fraudulent promises and assurances, when, to the surprise and astonishment of defendants and other settlers on said lots and land, the plaintiff company gave notice in the papers of the city of Leadville that defendants and all settlers on said lots must appear at once at the office of the attorney of plaintiff, in said city, and pay the full value of said lots, and the full value of all the improvements on the same, to the plaintiff company, and that all who neglected or refused to do so immediately would be ejected from their lots by law. That notice was published without giving defendants and other settlers any opportunity or chance to tender plaintiff the said nominal sum for said lots, and the said plaintiff wholly and absolutely denied and repudiated all of the promises and assurances made by its said officers and attorney, that said defendants and other settlers would at most only be expected to pay the nominal sum for said lots, and wholly refused to accept of the same from defendants and other settlers when tendered by them, but demanded not only the full value of said lots and the im-
57 provements upon the same, but demanded the most extravagant and exorbitant prices for the same, ranging at from $1,500 to $20,000 for single lots.

Defendants state that relying on the said assurances and promises of the said Starr and the officers and attorney of plaintiff company, they expended not less than $5,000 in making improvements on said premises, from the time notice of the application for said patent was published until the same was obtained by said Starr, in addition to all the improvements made on the same prior to the publication of said notice.

Defendants allege that the said Starr and said officers and attorney of plaintiff company falsely, fraudulently, and for the purpose of deceiving and misleading defendants and other settlers on said lots and town site, made said false promises and assurances to lull defendants and other settlers to sleep as to their danger and the real purposes and intentions of said conspirators to wrong and defraud defendants and other settlers as aforesaid, and to induce defendants and other settlers on said lots not to adverse or make any opposition to the application of said Starr for said patent in the land office, and to prevent defendants and other settlers from finding out and expos-

ing the fraud, perjury, and tricks of said conspirators in said land office before they should succeed in obtaining said patent; and that said conspirators went just as far as they could in such assurances and promises so as not to make definite and binding contracts with defendants and other settlers on said lots and land, but intentionally avoided making binding contracts as aforesaid in order to be able to defraud defendants and other settlers; and that said conspirators made said false promises and assurances for the further purpose of inducing defendants and other settlers to continue on making valuable improvements on said premises and said lots, and to continue building up said town or city and largely increasing the value of the same, so that said conspirators might wrong and defraud these defendants and other settlers out of the same whenever said patent should be obtained; and defendants allege that said false promises and assurances did deceive them and all other settlers on said lots, and lull them to sleep as to their danger and the wrongful and fraudulent purposes and intentions of said conspirators, and induced these defendants and other settlers on said lots and town-site to go on expending their money in making said improvements, and also induced defendants and other settlers to refrain from any and all attempts to find out the real facts and to adverse or oppose the said application for said patent in said land office; all of which defendants and other settlers were thereby induced to refrain from doing.

That although the said plaintiff company and said Starr wholly repudiated their said promises and assurances, and wholly refused to fix any nominal sum for defendants and other settlers to pay for said lots, or enter into any definite or binding contracts after said patent was obtained, and peremptorily demanded the most extravagant prices for said lots and said improvements made by defendants and other settlers themselves, and although defendants and other settlers had no opportunity to tender said sum of money, and were under no legal or equitable obligation to do so, yet defendants state that themselves and other settlers all tendered plaintiff company not only the said sum of $25 for each lot, which was to be the utmost demanded, according to said assurances and said promises, but also tendered much larger sums for said lots rather than be subjected to the expense and trouble of litigation; but the said Starr and plaintiff company, through its said officers and attorney, wholly refused to receive the same or to settle or compromise said matter in any manner, but demanded the utmost price for said lots and improvements and the premises in question in this action, and in order to recover the same and consummate said fraud and object of said wrongful conspiracy, as above alleged, commenced this action against defendants, and also similar actions against all other settlers on said lots and land, to the great wrong, damage, oppression, and harassment of defendants and other settlers as aforesaid on said lots and land.

These defendants therefore allege that said plaintiff company is wholly estopped, both at law and in equity, from having and maintaining this action against them.

V. COUNTER-CLAIM.—And for a further defense to this action defendants state that themselves and their grantors, while holding and occupying said premises mentioned in said complaint, under color of title adversely to the claims of the plaintiff, and in good faith, made valuable

improvements on the same up to the 23d day of May, A. D. 1881, of the value of $10,000; and that defendants have, since the said 23d day of May, 1881, up to the present time, made improvements on said premises of the value of $20,000. That defendants will, in pursuance of the statute in such case made and provided, and without a waiver of their right and claim as the owners of said premises, demand a judgment for the value of said improvements on the trial of this action, in case the right to the possession and title of said premises shall be decided against defendants. Defendants will, in that case, demand a judgment for $20,000 and costs of suit.

(S'g'd) T. A. GREEN,
Att'y for Defendants.

(Indorsed:) No. 346. St. Louis Smelting and Refining Company vs. Sarah Ray et al. 3 amended answer. Filed June 6, 1882. (S'g'd) Edward F. Bishop, clerk. T. A. Green, att'y for def'ts.

58 And afterwards, and on, to wit, the 13th day of June, A. D. 1882, came again the said plaintiff, by its attorneys aforesaid, and filed in said court and in said cause its demurrer to the 3d amended answer heretofore filed herein, and the said demurrer is in words and figures as follows, to wit:

Demurrer to third amended answer.

UNITED STATES OF AMERICA,
District of Colorado, ss:

In the circuit court of the United States in and for the district of Colorado, in the eighth circuit.

THE ST. LOUIS SMELTING AND REFINING COMPANY, plaintiff,
against
S. RAY, JOHN STEEL, JOHN MILL, A. M. JAMES, Henry Kneeland, J. O'Brien, J. I. Maroney, Enfield Thomas, defendants. } Demurrer.

The said plaintiff company demurs to that portion of the third amended answer of the said defendants filed herein, and called in said third
59 amended answer the defendants second defense and third defense and fourth defense or estoppel, and fifth defense, or counter-claim containing all that portion of the said third amended answer setting up and alleging new and affirmative matter as defenses, and for grounds of demurrer alleges:

That the said portion of said answer, nor either nor any part thereof, does not state or allege any facts sufficient to constitute any defense or any counter-claim to the cause of action set forth in the said complaint.

That said answer admits that the plaintiff is seized of a title in fee through a patent for the said lands from the United States to one Thomas Starr, and the supposed matters set forth in the said portions of the said third amended answer, and which avers a superior poss'ory title in the

defendants, and avers the location of a town-site on the public domain, and avers that said land was reserved from sale by act of Congress, and avers that said Thomas Starr was an alien and not a citizen of the United States, and attempts to aver the confederation
60 and conspiracy of one Edwin Harrison and August Myer, and other officers of the said plaintiff company, to procure a patent by fraud, subornation, and perjury, and avers that said Thomas Starr, Myer, and Harrison made an agreement to consolidate certain placer mining claims and agreed that said Starr should be assisted by said Meyer and Harrison to obtain the said Starr patent, and that the said land in dispute should be deeded and conveyed to the said plaintiff by Starr, and avers that the said mining claims were pretended and fraudulent, and secret surveys were made for the same, and that the improvements on said lands were worth a million of dollars, and that it was necessary for said Starr to commit perjury and suborn other witnesses to commit perjury to obtain said patent; that said patent was obtained by committing perjury, and that said Starr swore falsely to being a citizen of the United States, and in swearing that he was in the actual and quiet possession of the said land, and had
61 worked said *said* claims ever since 1861, and avers that said Starr suborned one Hiram C. Vaughn and David Houghton to commit perjury, and that said Vaughn and Houghton made a false oath that said Starr had been in continued possession of the said land, and avers that the United States land officers should have inserted certain exceptions and reservations in the said Starr patent, and that by false and fraudulent representation such exceptions were not put into the said patent, and that the said Starr and his confederates falsely represented to the land officers that said land was mineral land, and avers that the city of Leadville grew and increased in population from five to twenty thousand at the time said patent was issued, and the increase in the extent of lots was great; that said Starr was living in said city, and saw the improvements made upon said lots, consisting of smelters, warehouses, banks, hotels, etc., and that said Starr and his grantors stood by and fraudulently kept quiet and allowed said improvements to be made, and confederated with said Myer
62 and Harrison to secrete all their claims to the ownership of said land, and that said Myer was manager of the said plaintiff company and lived in the city of Leadville and witnessed the erection of the buildings and the making of extensive improvements upon said land, but never notified the defendants or any other settlers that the said Starr or the plaintiff would make any claims to the said land, and there was no mining ever done upon said land, and that said Starr, Myer, and Harrison through A. P. Hereford, their agent, deceived the settlers on said land by stating that they would only expect a nominal sum for said lots after the issuance of said patent, and that said defendants, relying upon said false promises, did not oppose the issuing of said patent; but that they afterwards demanded ex*h*orbitant prices for said lots, and that defendants made improvements upon said lots relying upon said false representations, and avers that said settlers by said false promises and assurances were
63 lulled to sleep as to their danger and the real purpose of said parties to obtain said patent, and false promises and assurances were made for the purpose of inducing the defendants to continue making valuable improvements, and that they were deceived thereby and induced to refrain from filing adverse claims in the Land Office; and that although said Starr

wholly repudiated said promises and refused to fix a nominal sum for said lots, but demanded an extravagant price therefor, and that defendants and other settlers tendered 25.00 each for said lots, that said Starr and the plaintiff company wholly refused to receive the same or to settle the matter, to the great wrong and damage of the defendants, do not nor do either or any of the said above-mentioned matters constitute any defense or counter-claim of any kind to the cause of action and the matters set forth in the said complaint in this action; that the said answer does not show with certainty when all or any of the improvements were made upon the said property, or any of the facts necessary to determine whether the said defend-
64, 65 ants are entitled to any counter-claim or set-off for any improvements whatever made upon the said premises.

SYMES & FOOT AND
THATCHER & GAST,
Att'ys for Pl'iff.

(Endorsed:) No. 346. The St. Louis S. & R. Co., plaintiff, vs. S. Ray et al., defendants. Demurrer to 3, amended ans. Filed June 13, 1882. (S'g'd) Edward F. Bishop, clerk. Symes & F. and T. & G., att'ys for pl'ff.

66, 67 And afterwards and on, to wit, the 19th day of June, A. D. 1882, the same being one of the regular juridical days of the May term, A. D. 1882, of said court, present the honorable George W. McCrary, circuit judge, and the honorable Moses Hallett, district judge, the following proceeding was had and entered of record in said court and in said cause, to wit:

Demurrer to 3d amended answer sustained.

THE ST. LOUIS SMELTING AND REFINING COMPANY *vs.* SARAH RAY ET AL. } For possession of specific real property and for damages.

From district court, Lake County.

At this day comes the said plaintiff, by G. G. Symes, esq., its attorney, and the said defendants by T. A. Green, esq., their attorney, also come.

And the demurrer of the said plaintiff to the second, third, fourth, and fifth defenses in their third amended answer filed herein on the 6th day of June, A. D. 1882, having heretofore come on to be heard, and having been argued by counsel, and by the court taken under advisement, and the court being now sufficiently advised in the premises, it seemeth
68 to the court here that the said second, third, and fourth defenses as aforesaid are not, nor is either thereof, sufficient in law, and that the said fifth defense is sufficient in law, and so the said demurrer is sustained as to the said second, third, and fourth defense, and overruled as to the said fifth defense in the said third amended answer.

And afterwards and on, to wit, the 21st day of June, A. D. 1882, came again the said plaintiff, by its attorneys aforesaid, and filed in said court

and in said cause its reply to counter-claim heretofore filed herein. And the said reply is in words and figures as follows, to wit:

Reply to counter-claim.

In the circuit court of the United States in and for the district of Colorado, in the eighth circuit.

THE ST. LOUIS SMELTING AND REFINING CO., plaintiff,
vs.
RAY, JOHN STEEL, JOHN MILL, A. M. James, Harry Kneeland, J. O'Brien, J. T. Maroney, Enfield, Haines, defendants.
} Reply to counter claim.

69 The said plaintiff company replies to the counter-claim contained in the third amended answer of the said defendants filed herein.

That the said company denies that the said defendants, or their grantors, or predecessors in interest, or any or either of them, while holding or occupying the said premises mentioned in the said complaint under color of title adversely to the claims of the plaintiff, or in good faith, bona fide, or in any way whatever, made any valuable improvements on the said premises before the 23d day of May, 1881, or at any other time, of the value of $10,000, or of any value whatever. And denies that the said defendants, or their grantors, or predecessors in interest, or any or either of them, since the 23d day of May, 1881, or at any time before the present time, under color of title, adversely to the claims of the plaintiff, or in good faith, or in any manner whatever, made valuable im-

70 provements on the said premises of the value of $10,000, or of any value whatever.

Denies that the said defendants or their grantors or predecessors in interest, or any or either of them, ever held or occupied the said premises under color of title adversely to the claims of the plaintiff, or in good faith or in any such manner as entitles the said defendants to counter-claim for any improvements upon the said premises.

SYMES & F. AND T. & G.,
Att'ys for Pl'ff.

(Endorsed:) No. 346. The St. Louis Smelting & Refining Co., plaintiff, vs. Ray, Steel, et al., defendants. Reply to counter-claim. Filed June 21, 1882. (S'g'd) Edward F. Bishop, clerk. Symes & Foote, Thatcher & Gast, att'ys for pl'ff.

And afterwards and on, to wit, the 22d day of June, A. D. 1882, the same being one of the regular juridical days of the May term, A. D. 1882, of said court, present the honorable George W. McCrary, circuit

71 judge, *and the honorable George W. McCrary, circuit judge*, the following proceeding was had and entered of record in said court and in said cause, to wit:

Order: Suit dismissed as to damages.

THE ST. LOUIS SMELTING AND REFINING Company
vs.
SARAH RAY ET AL.

346. For possession of specific real property and for damages.

From district court, Lake County.

At this day comes the said plaintiff, by G. G. Symes, esq., its attorney, and the said defendants, by T. A. Green, esq., their attorney, also comes.

And thereupon the said plaintiff here in open court saith it will no further prosecute its claim for damages herein without prejudice, nevertheless, to its right to institute its suit against the said defendants for a similar cause of action in any court of competent jurisdiction, as it shall be advised.

And thereupon the said defendants here in open court say they will no further prosecute their claim for damages in their answer herein without prejudice, nevertheless, to their right to institute their suit against
72 the said plaintiff for a similar cause of action in any court of competent jurisdiction, as they shall be advised.

Order: Trial verdict for plaintiff.

And thereupon, and on the same day, to wit, the 22d day of June, A. D. 1882, the following further proceeding was had and entered of record in said court and in said cause, to wit:

THE ST. LOUIS SMELTING AND REFINING Company
vs.
SARAH RAY, JOHN STEEL, JOHN MILL, A. M. James, Harry Kneeland, J. O'Brien, J. T. Maroney, Enfield, Thomas.

346. For possession of specific real property and for damages.

From district court, Lake County.

At this day comes the said plaintiff, by G. G. Symes, esq., its attorney, and the said defendants, by T. A. Green, esq., their attorney, also comes.

And thereupon come a jury, to wit, 1, William Finley; 2, Thomas H. Davy; 3, Samuel McMillen; 4, F. H. Bowers; 5, Rufus DuBois; 6, John Robinson; 7, Samuel Allen; 8, Rufus Snider; 9, Edward E. Achert; 10, George H. Mack; 11, James U. Marlow; 12, Thomas A.
73 Houghton; twelve good and lawful men, and they are duly selected and tried, impaneled, and sworn to well and truly try the issues herein joined, and a true verdict render according to the evidence.

And the said jurors having heard the evidence produced herein and the instructions of the court, upon their oaths do say they find for the plaintiff, and that the defendants are guilty of unlawfully withholding and detaining from the plaintiff the premises described in its complaint in this cause, as follows: Lot ten (10) in block two (2) in the St. Louis Smelting and Refining Company's addition to the city of Leadville, in the county

of Lake, and State of Colorado, and that the plaintiff is the owner thereof in fee, and is entitled to the possession of the same.

Wherefore, on motion of the said plaintiff, let judgment be entered herein upon the verdict of the jury in favor of the said plaintiff and against the said defendants for the possession of the premises as in the said verdict described and for costs, to be taxed.

74 And thereupon, on motion of the said defendant, it is ordered that execution herein be stayed until a similar case can be decided by the Supreme Court of the United States at the next term thereof; provided, nevertheless, that the said defendant in such case stipulate to submit such case to the said Supreme Court upon printed arguments under Rule XX of the said Supreme Court.

And thereupon and on the same day, to wit, the 22d day of June, A. D. 1882, judgment was duly entered against the said defendants in the judgment book of said court in pursuance of the statutes and rules of court, and the said judgment is in words and figures as follows, to wit:

Judgment.

THE ST. LOUIS SMELTING AND REFINING COMPANY, *vs.* SARAH RAY, JOHN STEEL, JOHN MILL, A. M. Janes, Harry Kneeland, J. O'Brien, J. T. Maroney, Enfield, Thomas.	For possession of specific, real property and for damages.

From district court, Lake County.

75 On this 22d day of June, A. D. 1882, the same being one of the regular juridical days of the May term, A. D. 1882, of said court, there being present the honorable George W. McCrary, circuit judge,

It is considered by the court that the said plaintiffs do have and recover of and from the said defendants possession of the premises, lands, and tenements in said verdict described, to wit, lot ten (10) in block two (2) in the St. Louis Smelting and Refining Company's addition to the city of Leadville, in the county of Lake and State of Colorado, and that it have a writ of possession therefor.

It is further considered by court that the said plaintiffs do have and recover of and from the said defendants its costs by it in this behalf laid out and expended to be taxed, and have execution therefor.

76 And afterwards, and on, to wit, the 26th day of June, A. D. 1882, came again the said parties respectively by their attorneys aforesaid, and filed in said court and in said cause a certain stipulation, as to argument in supreme court, which said stipulation is in words and figurs as follows, to wit:

Stipulation as to argument in supreme court.

In the circuit court of the United States in and for the district of Colorado, in the 8th circuit.

THE ST. LOUIS SMELTING AND REFINING COMPANY, plaintiff,
vs.
JOHN STEEL, SARAH RAY AND JOHN MILLS, et als., defendants.
} 346. Stipulation.

Whereas on the 22nd day of June, A. D. 1882, an order was made in this and several other and similar cases staying the executions on the judgments rendered in said causes until the defendants therein could take one of said cases as a test case to the Supreme Court of the United States, provided, the said defendants in such test case shall stipulate to
77 submit said test cause to the said Supreme Court on printed briefs of arguments under the provisions of the 20th rule of said Supreme Court.

Now it is hereby stipulated that the above-entitled cause be taken to the said Supreme Court as said test case, that the said cause be submitted to the said Supreme Court on printed briefs and arguments under the said 20th rule, that the said plaintiffs in error file their printed argument and serve copies thereof on the defendants in error on or before the 1st day of November, 1882.

That the said defendant in error file its argument and serve copies thereof on the plaintiffs in error on or before the fifteenth day of November, 1882, and that the said plaintiffs in error have until the first day of December, 1882, to file their argument in reply.

It is further stipulated that the defendants in the following suits: Nos. 292, 306, 309, 316, 317, 318, 319, 321, 322, 323, 325, 332, 339, 344,
78 346, 353, 354, 357, 358, 361, 362, 363, 366, and 367, on the docket of this court, referred to in the said order of the court in pursuance to which this stipulation is made, and in which executions are stayed until the decision of this test case in said Supreme Court, shall not take new trials in said cases under the statutes or code of Colorado.

Dated this 26th day of June, 1882.

(S'g'd) T. A. GREEN,
Att'y for Defendants in the above action and for all Defendants the other cases stayed by said order of said Court.

(S'g'd) G. G. SYMES & R. E. FOOTE, & THATCHER & GAST,
Att'ys for said Pl'ff Co.

(Endorsed:) No. 346. The St. Louis Smelting Refining Company, plaintiff, vs. John Steel & Sarah Ray et al., defendants. Stipulation. Filed June 26, 1882. (S'g'd) Edward F. Bishop, clerk. Symes & F. & T G., att'ys for pl'ff.

And afterwards, and on, to wit, the 8th day of July, A. D.
79 1882, the same being one of the regular juridical days of the May term, A. D. 1882, of said court, present the honorable Moses Hal-

lett, district judge, the following proceeding was had and entered of record in said court and in said cause, to wit:

Order fixing amount of bond on writ of error.

THE ST. LOUIS SMELTING AND REFINING Company *vs.* SARAH RAY ET AL.	For possession of specific real property, and for damages.

From district court, Lake County.

At this day comes the said plaintiff, by G. G. Symes, esq., its attorney, and the said defendants, by T. A. Green, esq., their attorney, also come.

And thereupon, as well the plaintiff as the said defendant, now here in open court consenting thereto, it is ordered that bond upon writ of error herein be in the sum of three thousand ($3,000) dollars.

And afterwards and on, to wit, the 31st day of July, A. D. 1882, came again the said defendants, by their attorney aforesaid, and filed in
80 said court and in said cause their bond, and sued out of said court a writ of error and citation to the Supreme Court of the United States, and the said bond is in words and figures as follows, to wit:

81 *Bond.*

UNITED STATES OF AMERICA,
District of Colorado:

Know all men by these presents that we, John Steel, Sarah Ray, John Mill, A. M. Jones, Harry Kneeland, John O'Brien, J. S. Manning, and Peter Thames, Enfield, as principals, and G. W. White, G. M. Barnes, S. C. Higinbotham, F. F. Brune, L. W. Green, C. E. Wyman, Joseph Pasley, Robert Fitzsimons, Martin Murray, & Edward Murray, as sureties, are held and firmly bound unto the St. Louis Smelting and Refining Company, its successors and assigns, in the full and just sum of three thousand ($3,000) dollars, to be paid to the said St. Louis Smelting and Refining Company, its successors and assigns, to which
82 payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally firmly by these presents. Sealed with our seals and dated this 22d day of July, in the year of our Lord one thousand eight hundred and eighty-two.

Whereas lately, at the May term A. D. 1882, of the said circuit court of the United States for the district of Colorado, in a suit pending in said court between the St. Louis Smelting and Refining Company, plaintiff, and John Steel, Sarah Ray, John Mill, A. M. Jones, Harry Kneeland, J. O'Brien, J. S. Manning, Enfield, and Peter Thames, defendants, judgment was rendered against the said John Steel, Sarah Ray, John Mill, A. M. Jones, Harry Kneeland, J. O'Brien, J. S. Manning, Enfield, and Peter Thames, and the said defendants, having obtained a writ of error and filed a copy thereof in the clerk's office of said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said The St. Louis Smelting and Refining Company, citing and admonish-

83 ing it to be and appear at a Supreme Court of the United States to be held at Washington, on the second Monday in October next:

Now, the condition of the above obligation is such, that if the said defendants, John Steel, Sarah Ray, John Mill, A. M. Jones, Harry Kneeland, J. O'Brien, J. S. Manning, Enfield, and Peter Thames, shall prosecute said writ of error to effect and answer all damages and costs, if they fail to make good their plea, then the above obligation to be void, else to remain in full force and virtue.

(S'g'd)	SARAH her × mark. RAY.	[SEAL.]
	Witness to Sarah Ray's mark.	[SEAL.]
(S'g'd)	C. E. WYMAN, witness.	[SEAL.]
"	PETER THAMES.	[SEAL.]
		[SEAL.]
		[SEAL.]
"	G. W. WHITE.	[SEAL.]
"	G. M. BARNS.	[SEAL.]
"	S. C. HIGINBOTHAM.	[SEAL.]
"	F. F. BRUNE.	[SEAL.]
"	L. W. GREEN.	[SEAL.]
"	C. E. WYMAN.	[SEAL.]
"	JOS. PASLEY.	[SEAL.]
"	ROBERT FITZSIMONS.	[SEAL.]
"	MARTIN MURRAY.	[SEAL.]
"	EDW'D MURRAY.	[SEAL.]

84 Approved July 31, 1882.

(S'g'd) MOSES HALLETT,
Dist. Judge.

UNITED STATES OF AMERICA,
District of Colorado, County of Lake, ss:

G. M. Barns, S. C. Higinbotham, F. F. Brune, L. W. Green, C. E. Wyman, G. W. White, Joseph Pasley, Robert Fitzsimons, Martin Murray, and Edward Murray, as sureties upon the within bond, being each first duly sworn, deposes and saith that he is worth the sum below set opposite his name, in 'incumbered real estate, that is to say:

As to G. M. Barns, three thousand ($3,000.00) dollars; as to S. C. Higinbotham, three thousand ($3,000.00) dollars; as to F. F. Brune, twenty-five hundred ($2,500) dollars; as to L. W. Green, one thousand ($1,000.00) dollars; as to C. E. Wyman, six thousand ($6,000) dollars; as to G. W. White, two thousand ($2,000) dollars; as to Jas. Pasley, one thousand dollars; as to Robert Fitzsimons, one thousand dollars; as to Martin Murray, one thousand dollars; as to Ed. Murray, 5,000, five thousand dollars; as to , dollars, over and

85 above all his just debts and liabilities, and in property subject to levy and sale upon execution.

Subscribed and sworn to before me at Leadville, this 22d day of July, A. D. 1882.

[NOTARIAL SEAL.] (S'g'd) A. A. HIGINBOTHAM,
Notary Public.

(Endorsed:) No. 346. John Steel, Sarah Ray et al. vs. The St. Louis Smelting and Refining Company. Supersedeas bond. Filed Jul. 31, 1882. (S'g'd) Edward F. Bishop, clerk.

And the said writ of error is hereto attached, to wit:

Writ of error.

86 *Writ of error to court, U. S. district of Colorado.*

THE UNITED STATES OF AMERICA.

UNITED STATES OF AMERICA,
District of Colorado, ss:

The President of the United States to the judges of the circuit court of the United States for the district of Colorado, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said circuit court, between the St. Louis Smelting and Refining Company, and John Steel, Sarah Ray, John Mill, A. M. Jones, Harry Kneeland, John O'Brien, J. S. Manning, and Peter Thomas, Enfield, a manifest error hath happened, to the great damage of the said John Steel, Sarah Ray, John Mill, Harry Kneeland, John O'Brien, J. S. Manning, Peter Thomas, Enfield, as by their complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, at Washington City, D. C., together with this writ, so that you have the same at Washington on the 9th day of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States, should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 31st day of July, in the year of our Lord one thousand eight hundred and eighty-two, and of the Independence of the United States the 107' year.

[SEAL.] EDWARD F. BISHOP, *Clerk.*

Allowed by—

MOSES B. HALLETT,
District Judge.

87 *Return.*

THE UNITED STATES OF AMERICA,
District of Colorado, ss:

In obedience to the command of the within writ, I herewith transmit to the honorable Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

Witness my hand and the seal of said circuit court, at Denver, in said district, this 20th day of September, A. D. 1882.

[SEAL.] EDWARD F. BISHOP, *Clerk*,
By , *Deputy Clerk*.

(Indorsed:) Gen. No. 346. Circuit court of the United States. John Steel, Sarah Ray, et al., plaintiff" in error, vs. The St. Louis Smelting & Refining Co. Writ of error to circuit court U. S. district of Colorado. Filed in cir't court of the U. S. this 31' day of July, A. D. 1882. , clerk, by , deputy clerk. T. A. Green, attorney for plaintiff" in error.

And the said citation is hereto attached, to wit:

CITATION.

88 *Citation U. S. circuit court.*

THE UNITED STATES OF AMERICA,
District of Colorado:

The United States of America to St. Louis Smelting and Refining Company, greeting:

You are hereby cited and admonished to be and appear at a term of the United States Supreme Court, to be holden at Washington City, D. C., on the ninth day of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Colorado, wherein John Steel, Sarah Ray, John Mill, A. M. Jones, Harry Kneeland, John O'Brien, J. S. Maning, and Peter Thomas, Enfield are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Moses Hallett, judge of the circuit court of the United States for the district of Colorado, this 31st day of July, in the year of our Lord one thousand eight hundred and eighty-two.

MOSES HALLETT, *Judge*.

Rec'd a copy of the above July 31st, 1882.

SYMES & FOOT,
Att'ys St. Louis M. & R. Co.

89 (Indorsed:) Gen. No. 346. Circuit court of the United States, district of Colorado. John Steele, Sarah Ray, et al., plaintiff" in error, vs. The St. Louis Smelting & Refining Co., defendant in error. Citation. Filed in cir't court of the U. S. this 31' day of July, A. D. 1882. , clerk, by , deputy clerk. T. A. Green, attorney for plaintiff" in error.

90 And afterwards and on, to wit, the 2d day of August, A. D. 1882, came again the said defendants, by their attorney aforesaid, and filed in said court and in said cause their affidavit as to value of property in controversy; and the said affidavit is in words and figures as follows, to wit:

Affidavit as to value.

UNITED STATES OF AMERICA, *ss:*

In the United States circuit court for the district of Colorado, May term, A. D. 1882.

THE ST. LOUIS SMELTING AND REFINING CO., plaintiffs,
vs.
JOHN STEELE, SARAH RAY, ET AL., DEFENDANTS.

STATE OF COLORADO,
County of Lake, ss:

George M. Barns and L. W. Green, each *G. M. Barns & L. W. Green* of lawful age, being first duly sworn, on oath states that they are well acquainted with lot No. 10, block No. 2, in the St. Louis Smelting Compan*ies*, addition to the city of Leadville, Lake County, and State of Colorado, and being the same lot in litigation in the above-entitled
91 ejectment suit; and affiants further states that they are well acquainted with the value of said lot, and that it is worth over five thousand dollars, and that the full value of the same is eight thousand dollars.

(S'g'd) G. M. BARNS.
L. W. GREEN.

Subscribed and sworn to before me this 14th day of July, A. D. 1882.
[NOTARIAL SEAL.] (Signed) A. A. HIGINBOTHAM,
Notary Public.

(Endorsed:) No. 346. The St. Louis Smelting and Refining Co. v. John Steel, Sarah Ray, et al. Affidavit as to value of matter in dispute. Filed Aug. 2, 1882. (S'g'd,) Edward F. Bishop, clerk.

And afterwards and on, to wit, the 11th day of August, A. D. 1882, came again the said defendants, by their attorneys aforesaid, and filed in said court and in said cause their order for copy of record, and the said order is in words and figures as follows, to wit:

Order for copy of record.

92 UNITED STATES OF AMERICA:

In the United States circuit court for the district of Colorado.

THE ST. LOUIS SMELTING AND REFINING COMPANY, plaintiff,
v.
JOHN STEEL, SARAH RAY, ET AL., DEFENDANTS.
Order for copy of record.

Mr. CLERK: Please make out full copy of the record in the above en-

titled case, except the first two answers filed in the same; the third amended answer, to which a demurrer was sustained, included in the record. Also, the affidavit as to value of the property in question filed since judgment was entered.

Said copy of said record is for the Supreme Court of the U. S. in compliance with writ of error in said action.

(S'g'd) T. A. GREEN,
Att'y for said Def'ts and Plaintiffs in Error.

93 (Endorsed:) No. 346. The St. Louis Smelting and Refining Company. Order for copy of record. Filed Aug. 11, 1882. (S'g'd,) Edward F. Bishop, clerk. T. A. Green, att'y for def'ts.

UNITED STATES OF AMERICA,
District of Colorado, ss:

I, Edward F. Bishop, clerk of the circuit court of the United States for the district of Colorado, sitting at Denver, do hereby certify the above and foregoing to be a true, perfect, and complete transcript and copy of *a true copy of* the record asked for by the said plaintiffs in error in their præcipe appearing herein upon page 92, heretofore filed or had and entered of record in said court, and in a certain cause lately in said court pending, wherein Sarah Ray et al. were plaintiffs and The St. Louis Smelting and Refining Company was defendant, as fully and completely as the same still remain on file or of record in my office.

In testimony to the above, I do hereunto sign my name and affix the seal of said court, at Denver, in said district, this 20th day of September, A. D. 1882.

[SEAL.] EDWARD F. BISHOP, *Clerk.*

Cost of transcript: 182 fols. @ 10c., 18.20; certificate, .35—18.55. Paid by T. A. Green, for plaintiffs in error.

94 *Assignment of errors.*

In the Supreme Court of the United States. October term, A. D. 1882.

UNITED STATES OF AMERICA:

JOHN STEELE, SARAH RAY, ET AL., PLAINTIFFS in error,
vs.
THE ST. LOUIS SMELTING AND REFINING CO., def'ts in error.

And now, the said plaintiffs in error come, and say that in the record and proceedings aforesaid there are manifest errors, as follows, to wit:

First. The court below erred in sustaining the demurrer to the second defense set up in the third amended answer.

Second. The court below erred in sustaining the demurrer to the third defense set up in the 3rd amended answer.

Third. The court below erred in sustaining the demurrer to the fourth defense set up in the 3rd amended answer.

Fourth. The court below erred in sustaining the demurrer to all of the special matter and special defenses set up in said 3rd amended answer.

Fifth. The court erred in giving judgment in favor of said St. Louis Smelting and Refining Company, def'ts in error, whereas it ought to have given judgment in favor of plaintiffs in error; therefore, plaintiffs in
95 error pray that said judgment may be reversed, annulled, and held for nothing; and that they may be restored to all things they have lost by reason thereof.

T. A. GREEN,
Attorney for Plaintiff' in Error.

(Indorsed:) John Steele, Sarah Ray et al., vs. The St. Louis Smelting and Refining Company. Assignment of errors. T. A. Green, att'y for plaintiffs in error.

(Also indorsed:) Supreme Court U. S. 1882, October term. No. 957. John Steel, Sarah Ray et al., pl'ffs in error, vs. The St. Louis Smelting & Refining Co. Assignment of errors. Filed 3d October, 1882.

(Stamp:) Office Supreme Court U. S. Filed Oct. 3, 1882. James H. McKenney, clerk.

(Indorsement on cover:) No. 957. John Steel, Sarah Ray, John Mill, A. M. Jones, Harry Kneeland, John O'Brien, J. S. Manning, Peter Thomas, and Enfield, plaintiffs in error, vs. The St. Louis Smelting and Refining Company. Colorado C. C. U. S. Filed 2nd October, 1882.

16-447

OFFICE SUPREME COURT U. S.
FILED
NOV 23 1882
JAMES H. McKENNEY, Clerk.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

SARAH RAY, JOHN STEELE, JOHN MILL, *et al.*,
Plaintiffs in Error,
vs.
THE ST. LOUIS SMELTING AND REFINING CO.,
Defendant in Error.

Error to the Circuit Court of the United States for the District of Colorado, sitting at Denver.

BRIEF AND ARGUMENT OF T. A. GREEN FOR PLAINTIFFS IN ERROR.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

SARAH RAY, JOHN STEELE, JOHN MILL, *et al.*, *Plaintiffs in Error,* *vs.* THE ST. LOUIS SMELTING AND REFINING CO., *Defendant in Error.*	*Error to the Circuit Court of the United States for the District of Colorado, sitting at Denver.*

STATEMENT OF THE CASE.

This is an action of ejectment commenced in the District Court for the county of Lake and State of Colorado, on the 23d day of April, A. D. 1879, by the St. Louis Smelting and Refining Company vs. Sarah Ray, John Steele *et al.*, to recover a certain lot in the City of Leadville, county and State aforesaid.

As the case comes to this Court on a demurrer to the third amended answer, upon which the plaintiffs in error stood in the Court below, I shall set out the complaint

and the said third amended answer in full, together with the demurrer to the same, which was sustained by the Court below.

The complaint is in the words and figures following, to wit:

The plaintiff complains of the defendants, and states that it, the said plaintiff, is a corporation duly organized, created and incorporated under and by virtue of the laws of the State of Missouri, with power to purchase, own and hold real estate. That it is the owner in fee, and entitled to the possession of the following described real estate situate in the county of Lake and State of Colorado, to wit: Lot number ten (10) in block number two (2) as shown upon a map and plat of town lots made by the plaintiff, entitled the St. Louis Smelting and Refining Company's addition to the City of Leadville, which map and plat is duly filed in the office of the clerk and recorder of said county, and that the defendants wrongfully withheld said premises from the plaintiff, to its damage in the sum of one thousand dollars; the plaintiff therefore asks judgment against the defendant for the recovery of the possession of said premises, for said sum of one thousand dollars, its damages for the detention of the same, and for its costs herein.

THOMSON, HEREFORD & SAYER,
Attorneys for Plaintiff.

The third amended answer of defendants is in the words and figures following, to wit:

UNITED STATES OF AMERICA.

In the United States Circuit Court for the District of Colorado, May Term, A. D. 1882.

THE ST. LOUIS SMELTING AND REFINING CO., *Plaintiff,*
vs.
SARAH RAY *et al.* *Defendants.*

Third Amended Answer.

Defendants deny that the plaintiff was, at the commencement of said action, or at any other time prior thereto or since, the owner of or entitled to the possession of said premises mentioned and described in said complaint, or any part thereof, or any interest therein.

Deny that said defendants did, at the time alleged in said complaint, or at any other time, wrongfully enter upon said premises, and unlawfully and wrongfully oust the said plaintiff from the same, as alleged in said complaint.

Deny that said defendants wrongfully withhold said premises from said plaintiff; and deny that said plaintiff has been damaged by the said alleged ouster and wrongful withholding of said premises from plaintiff, either in the sum alleged in said complaint, or any other sum.

Deny that said premises are worth the sum of rents and profits alleged in said complaint.

II. DEFENSE.

And for a further defense in this behalf and to this action, defendants state: That they are the owners of said premises mentioned and described in said complaint, by superiority of possessory title, and priority of actual possession of the same as a part of a town site on the public domain of the United States, and more fully set forth as follows, to wit:

That said town site was first selected and located on the unoccupied, unclaimed and vacant public domain of the United States about the 1st of June, A. D. 1860, and was laid off into public streets, alleys and squares, and into lots and blocks, at the date aforesaid, and was at said date under the control of a regularly organized and legally established city government, and was called the town of Agassiz; that said town continued to exist, and contained from 500 to 3,000 population, up until about A. D. 1873, when the name of said town was changed to Leadville.

That from the date last aforesaid the said town of Leadville built up and increased in population very rapidly until the time of the commencement of this action, and contained during all of said time from 5,000 to 16,000 population, and included within its limits over six hundred acres of land, all of which was selected from the unoccupied, vacant and unclaimed public domain of the United States, and was duly selected, set apart and occupied and possessed and used as a town site from about the said first day of June, A. D. 1860, continuously up to the commencement of this suit, and is still so used, possessed and occupied.

That said town site has during all of said time since the aforesaid first day of June, 1860, been duly surveyed and laid off into public streets, alleys and grounds, and into lots and blocks and additions, and has been duly incorporated from said date as a town or city, first under the laws of the Territory of Colorado, and afterwards under the general incorporation laws for towns and cities of the State of Colorado; and has during all of said time been under the control of a regularly organized city government, consisting of a Mayor, City Council, City Treasurer, Assessor, Collector, Attorney and other city officers, and a well organized police force and fire department; and the lots and property in said town or city have been

duly assessed and taxes collected to support said city government, and also for county and State purposes, during all of said time since the said first day of June, A. D. 1860, up to the present time; and said city has incurred large indebtedness and expended large sums of money during all of said time in the improvement of streets, alleys and public grounds, and in erecting school houses and other necessary public buildings for city purposes; and that individuals have expended, during all of said time since the selection of said town site, immense sums of money in building furnaces, smelters, sample works, manufactories, shops, stores, warehouses, hotels, livery and other stables, banks, theaters and dwellings, and the people of said city have, during all of said time since the location of the same, spent large sums of money in building churches, hospitals and other charitable institutions; and the said county of Lake, in the said State of Colorado, in which said city of Leadville is situated, did, on or about the first day of January, A. D. 1875, make said city of Leadville the county seat of said county, and said county has spent large sums of money in erecting a large and substantial court house and jail, and in other necessary improvements in and about the same.

That the said premises in question, and mentioned and described in said complaint as a certain lot in said city of Leadville, is now and has been, during all of said time, since the selection and location of said town site, to wit, the first day of June, A. D. 1860, a part of said town site, and included within the limits of the same; and the said defendants and their grantors have been in the actual, exclusive and peaceable possession of the same, during all of said time, and have, during that time, made valuable improvements and erected valuable buildings on said premises, and have, under the laws of Congress and the laws of Colorado, acquired a good title to and vested rights

in said premises; and defendant's said right to said premises has been quieted by the statutes of limitation of the State of Colorado; by the peaceable and quiet possession of said premises, in good faith, under claim of title and payment of all taxes assessed against the same for more than five years next before the commencement of this suit.

Defendants further state, that all of the land now included within the limits of the said city of Leadville, and of which the premises in question form a part, was, to wit: on the 1st day of June, A. D. 1860, selected as a town site on the public domain of the United States, and has, from that date to the present time, been used, occupied and possessed for the sole purpose of a town site, and all of said land has been actually settled and occupied for purposes of trade and business, and not for agriculture; and has been wholly reserved from sale by the laws of Congress, and the Land Department of the Government and its officers have had no jurisdiction or authority to sell the same for either mining or agricultural purposes; and defendants state that said land is neither mineral nor agricultural land, and is of no value at all for any purpose except a town site, but that said land is a natural and necessary town site for the large and valuable mines and mining belt just east of said town or city, and in its immediate neighborhood; that it is an absolutely necessary center of trade, business and commerce for said mines and mining region, and was selected, used and occupied as such center of trade and town site long prior to any claim, or pretended claim, plaintiff or its grantors, or any one else, had to said town site or said premises in question, and was then, and always has been, reserved from sale by the laws of Congress.

That the only color or pretense of title which plaintiff makes to the premises in question is derived from a void

patent, issued by the officers of the Land Department to lands reserved from sale by the laws of Congress, to one Thomas Starr, who was an alien, and not a citizen of the United States, and who had not before, or at the time he applied for said patent, declared his intention to become a citizen of the United States; and that said patent was so issued to said reserved lands to said alien on the 29th day of March, A. D. 1879, for 164 61-100 acres of land, all of which was included within the limits of the said city of Leadville, which was at that time, and had been a long time prior thereto, an incorporated town or city under the laws of the State of Colorado, and all of the land included in said void patent had been selected, used, occupied and possessed as a town site, and settled and occupied for the purposes of trade and business, and not for agricultural purposes, long prior to the pretended location of any of the mining claims included in said void patent, to wit: on the 1st day of June, A. D. 1860; that the said Thomas Starr was born in the county of Tyrone, in Ireland, of parents who were foreigners and subjects of Great Britain, and who never became citizens of the United States; and that during all of the time from the said 1st day of June, 1860, up to about the 18th day of March, 1878—the date of the application for said void patent—the said Thomas Starr was an alien, who had not declared his intention to become a citizen of the United States, and who could not legally locate said mining claims included in said void patent, or legally purchase the same, or hold any possessory right to the same so as to prevent said land included in said patent from being duly selected, used, occupied and possessed as a town site, or actually settled and occupied for the purposes of trade and business; and that the said alien, Thomas Starr, could acquire no rights under the mining laws of Congress, or the laws of the State of Colorado, during said

period of time, to prevent said land from being selected and set apart and used, occupied and possessed as a town site, and for trade and business; and the officers of said Land Department had no jurisdiction at the time of issuing said patent, to wit: on the 29th day of March, A. D. 1879, to issue the same to said alien, or any one else; that at that date all of the land included within the limits of the said city of Leadville, and of which the premises in dispute in this action were a part, was wholly reserved from sale by the laws of Congress, and, therefore, said patent is void.

III. Defense.

And for a further defense in this behalf, these defendants state that they are the owners of the premises in dispute by virtue of prior, actual and exclusive possession of the same as a part of a town site on the public domain of the United States, as fully set forth in the above and second defense in this answer, which said defense is hereby referred to and made a part of this defense, to show fully the facts constituting defendants' possessory title to said premises, and the alienage of said Starr, and for all purposes of this defense. That all of the right or title claimed by the plaintiff company to the premises in question is derived from a certain mineral patent for 164 61-100 acres of mining ground, obtained by Thomas Starr from the Government of the United States on the 29th day of March, A. D. 1879.

And defendants further state, that said Thomas Starr combined and confederated with one Edwin Harrison, president of plaintiff company, and one August Myers, a member of and general manager of said company, and other officers of the same, to obtain said mineral patent from the Government by collusion, fraud, bribery, perjury and subornation of perjury, and to commit a gross fraud upon these defendants and all other *bona fide* settlers on

said lots and town site, and upon the mining laws of Congress, and upon the Government of the United States, as hereinafter set forth:

That the said August Myers pretended to have located a placer mining claim on said town site on the 24th day of August, 1877, containing 31 61-100 acres of the land included in said patent, which said Myers afterwards sold, or pretended to sell, to said Starr.

That said Starr, Myers and Harrison entered into an agreement whereby they consolidated said pretended claim of 31 61-100 acres with certain pretended placer claims of said Starr, making in all 164 61-100 acres, for which said patent was obtained in the name of Thomas Starr.

That in consideration of the said combination and conspiracy, the said Starr agreed with said Myers and Harrison, acting for plaintiff company, that in case said Myers and Harrison, and other officers of said company, would assist him to obtain said patent in the manner hereinafter mentioned, he would convey the said 31 61-100 acres of said land to said plaintiff company whenever said Starr should obtain said patent, which said Starr did, and the premises in question in this action are a part of the said 31 61-100 acres so conveyed by said Starr to plaintiff.

That all of said placer mining claims were pretended and fraudulent, and the said conspirators had secret surveys made of the same, upon and including said town site, or a large and valuable portion thereof, the said 164 61-100 acres all being within the same, and including land wholly used as a town site, and occupied for that purpose, and including the improvements on the same, made by defendants and other settlers, worth more than *one million dollars.*

That in order to obtain said patent it was necessary for

said Starr to commit perjury as to every material allegation of his application, and to bribe and suborn other witnesses to commit the crime of perjury.

That in pursuance of said conspiracy to obtain said patent for said 164 61-100 acres of said town site, the said Starr, with the knowledge and consent of plaintiff company, committed the crime of willful and corrupt perjury in this, to wit:

That said Starr did, on the 15th day of March, A. D. 1878, at the county of Lake and State of Colorado, make oath to his application for said patent before C. E. Anderson, a notary public within and for the said county and State, and within the Fairplay Land District, in the said State of Colorado, and who was duly authorized to administer such oaths, that he, the said Thomas Starr, was a citizen of the United States, when in truth and in fact the said Thomas Starr was an alien and subject of Great Britain, who had never declared his intention to become a citizen of the United States, and then and there willfully and corruptly committed the crime of perjury in order to obtain said patent to said land and town site.

That the said Thomas Starr, at the same time and place, and before the same officer, also committed the crime of willful and corrupt perjury in this, to wit:

Said Starr made oath that he was the owner of and in the actual, quiet and undisturbed possession of said land included in said patent, and that he was entitled to the possession of the same, being 164 61-100 acres, when in truth and in fact he was not, and never was, in the actual possession of the same, or any part thereof, and was never the owner of the same, or any part thereof, or entitled to the possession of the same, or any part thereof. That said Starr also made oath, at the same time and place, that himself and grantors had worked said claim more or less every year since 1861, and had done work and made

improvments on said claim to the value of $20,000, when in truth and in fact neither the said Starr nor any of his grantors ever expended one dollar on said claim at any time, or ever owned said claim, or any part thereof, and that said Starr committed willful and corrupt perjury as to this allegation in said application for said patent; and that said Starr willfully and corruptly perjured himself in regard to every material allegation in said application for said patent.

That said Starr also, in order to obtain said patent, bribed and suborned one Hiram C. Vaughn and one David Houghton to commit willful and corrupt perjury, at the same time and place and before the same officer, in this, to wit: The said Vaughn and Houghton made oath before the said officer that they had been acquainted with the said consolidated mining claim, for which said Starr obtained said patent, since June 17, 1860; that said Starr and his grantors of said claim had been in the actual, notorious and continuous possession of said claim since the said 17th day of June, 1860; and that said possession had been perfect during all that time, when in truth and in fact the said claim never had any pretended existence until about August, 1877, and neither the said Starr nor his grantors ever had any possession at all of said mining claim, or any part thereof, and that the land included in said patent was used, occupied and possessed as a town site as aforesaid.

That said false affidavits were necessary to obtain said patent, and were used in said Land Office in support of said application for said patent by said Starr.

That under the general rules and regulations of the United States Land Office in regard to the issuing of all mineral patents, the officers of said Land Office are required to insert certain exceptions in each and all patents

issued by said office of that kind, and that among said exceptions is the following one, to wit:

"Excepting and excluding, however, from these presents, all town property rights upon the surface, and there are hereby expressly excepted and excluded from the same all houses, buildings, lots, blocks, streets, alleys, or other municipal improvements on the surface of the above described premises, not belonging to the grantees herein, and all rights necessary and proper to the occupation, possession and enjoyment of the same."

That the said Starr and plaintiff company, by false and fraudulent statements and representations to the officers of said Land Office that there was no town site on said land, and no surface improvements but what belonged to said Starr, and by the said false oath of said Starr, and the said false affidavits obtained of the said Vaughn and Houghton by subornation and bribery, deceived and misled the officers of the United States Land Office, and induced them to believe that there was no town site upon the land included in said patent, or any part thereof; and that the same was all owned and possessed by said Starr for mining purposes, and was purely mining ground, and that the same had all been so owned and occupied for mining purposes ever since the 17th day of June, 1860, up to the date of said application for said patent, March 18, 1878—about eighteen years—and thereby wrongfully and fraudulently induced the officers of the Land Office at Washington City to leave the said exception above mentioned out of the said patent when the same was issued to said Starr; and that said fraud, perjury, bribery, deceit, misrepresentation and falsehood were secretly used and practiced by said Starr and the said officers of the said plaintiff company upon the said officers of said Land Office at Washington City, and in said Land District, to obtain said patent without the said town site exception

being inserted in the same, for the purpose and with the intent of wronging and defrauding these defendants and other settlers out of their improvements on said lots and town site, and out of their possessory rights to said lots and town site.

That the improvements on the lots and premises in question in this action, and made in good faith and under a *bona fide* claim of possessory title by defendants and their grantors, were, and are, of the value of $10,000, and the improvements by the other settlers on said land amounted to not less than $500,000 in value, made by said settlers in good faith and as *bona fide* claimants of said lots and town site; and the whole value of said land and improvements on said town site at the date of said patent was not less than one million dollars.

That said Starr and his said confederates also falsely and fraudulently represented to the officers of said Land Office that said land was mineral land, and valuable for mining purposes, and that said parties were patenting said land wholly for mining purposes, when, in truth and in fact, the said land was of no value at all for mining purposes, and that said Starr and his said confederates and grantors had never done any mining at all on the same, and never have, up to this time, done any mining on said land; but said Starr and confederates patented said land wholly for the purpose of wronging and defrauding the defendants and other settlers on the same out of their improvements aforesaid, and out of their possessory rights to said lots, and also with the intention of wronging and defrauding the Government out of said town site, and obtaining, through fraud, perjury and bribery and subornation of perjury, as above alleged, the said land and all of the said improvements at the price of $2.50 per acre, when said land was worth to the Government, under the town site laws of Congress, from $100

to $10,000 per acre. Defendants therefore allege that said patent is wholly fraudulent and void as to defendants and other settlers on said town site, and as to the Government of the United States.

IV. Estoppel.

And, for a further defense in this behalf, these defendants state, that they are the owners of the premises in question, and entitled to the possession of the same, by virtue of prior, actual and exclusive possession of the same as a part of a town site on the public domain of the United States, as alleged in the second defense set forth in this answer, and all of the facts alleged and set forth in the second defense in regard to said town site are hereby referred to and made a part of this defense. That all of the right or title claimed by the plaintiff company to the premises in question is derived from a certain mineral patent for 164 61-100 acres of mining ground, obtained by Thomas Starr from the Government of the United States on the 29th day of March, A. D. 1879.

And these defendants allege, that the said Thomas Starr obtained the said placer mining patent, under which plaintiff claims title in this action, for a number of consolidated placer mining claims, alleged by him to have been located from June 17, 1860, up to about June, 1877, and making in all 164 61-100 acres of pretended placer ground, all of which is included within the limits of the said town site and city of Leadville, as alleged in said second defense in this answer.

That the said Starr claims to have owned all of the placer mining claims included in said consolidated claim, for which said patent was issued, since the month of August, A. D. 1877, and his grantors since June 17, 1860; and these defendants state, that said city of Leadville

grew and increased in population from about 5,000 people at that date to about 20,000 people at the time said patent was issued, to wit: on the 29th day of March, A. D. 1879; and that the increase in the extent and value of the lots and improvements in said city was very great during that time, and that said city was being extended in every direction during said time; and that the said Thomas Starr, patentee, was living in said city during all of said time, and was present and witnessed all the improvements that were being made in said city, and the manner in which it was extending its limits, and the large sums of money that were being expended by said city for public improvements, and by these defendants and other settlers on said lots and land included in said patent; and the business buildings, furnaces, smelters, warehouses, banks, hotels, churches, dwelling houses and public buildings, amounting in the aggregate to over half a million dollars at least; and, during all of said time, the said Starr and his grantors stood by, and not only intentionally and fraudulently kept quiet in regard to his and their claim of ownership in said mining claims, or any part thereof, or to any of the land on which said city was being built, but the said Starr combined and confederated with the said August Myers and Edwin Harrison, president of plaintiff company—which said company now claims to own and to have had a secret written contract with said Starr for the conveyance to said company of 31 61-100 acres of said land, including the premises in question—to stand by and secrete all of their claims to the ownership of said land, and to secrete all of their efforts and their intention to obtain a patent to the same; and never, at any time during all the time from August, 1877, up to the time of the application for said patent, made known to the city, or to defendants, or to any of the settlers on said land, that the said Starr or the plaintiff

company claimed, or pretended to claim, any possessory right or title whatever to said land, or any part thereof, or that they or their grantors had ever located the same, or any part thereof.

The said August Myers, general manager of said plaintiff company, lived in the said city of Leadville during all of said time, and claimed to have located 31 61-100 acres of said land, included in said patent, on the 24th day of August, A. D. 1877, and to have owned the same by virtue of said location, and to have consolidated the same in the said Starr claim for the purpose of being patented by said Starr, and which is the same land conveyed by said Starr to plaintiff company, and of which the premises in question in this action are a part; and the said Myers stood by during all that time, up to the 8th day of March, A. D. 1878, and witnessed from day to day during all of that time the said city, and these defendants and other settlers on said land, building up and improving said city and the part thereof located on said land, and their expending tens of thousands of dollars in such improvements; but never at any time, or in any manner, notified defendants or said city, or other settlers on said land, that said plaintiff company or himself, or said Starr, or any one else, had or made, or would ever make, any claim whatever to said land, or any part thereof; but intentionally and fraudulently secreted and concealed and suppressed such claim of possessory title to the same; and combined and conspired with said Harrison, president of said company, who was also present during all of said time, and with the said Starr, to suppress and conceal from defendants and other settlers on said town site and land all such claims, for the purpose and with the intention of allowing defendants and other settlers to go on and expend their money in building up said city and making valuable improvements on said

lots, with the intention of obtaining said patent, and thereby wronging and defrauding defendants and other *bona fide* settlers on said lots not only out of their possessory right and title to the same, but also out of all of said improvements. That up to the date of said application for said patent, these defendants had in good faith expended the sum of $5,000 in erecting buildings and making valuable and necessary improvements on the premises in question in this action, under a *bona fide* claim of possessory title to said premises as a part of a town site on the public domain of the United States; and that up to that date defendants had no notice whatever that said Starr, or Myers, or Harrison, or plaintiff company, had or made any claim whatever to said premises, or said land or lots on said town site. That there was no mining ever done on said land, and there were no notices or anything thereon to lead defendants or other settlers on the same to suppose or believe that the same was ever located by any one as mineral land; but, on the contrary, said land was appropriated and occupied as a town site and for purposes of business and trade, and for smelters and manufacturing purposes, and for nothing else; and that the said city itself, and all the inhabitants of the same, acted upon the belief and supposition that the same was a town site, and that the possessory titles to said lots were good and valid; and defendants and other settlers made all of their said improvements on the same believing that their said titles were good. That said Starr only published his notice for said patent in a weekly paper in said city of Leadville, and had the surveyor make out the description of said consolidated placer claim in such manner that no one but a skilled surveyor could tell where such land was situated, except that it was in the county of Lake and State of Colorado; that said notice was intentionally and fraudulently published in that manner, so as really to

give defendants and other settlers no notice at all that said application for said patent contained any land at all either in or near the city of Leadville.

That the said Myers and Harrison, as officers of plaintiff company, also conspired and confederated with said Starr to induce the officers of the Land Office to issue said patent without inserting the exception as to a town site and surface improvements, mentioned and set out in the above third defense in this answer, which exception and all the facts connected with the same, as set forth in said third defense, are hereby referred to and made a part of this defense, and all of the facts alleged in said third defense necessary to make this defense perfect are hereby referred to and made a part of this defense.

That said Starr and his said co-conspirators wholly secreted from defendants and other settlers on said land and lots all of their efforts and intention to obtain said patent, until their notice was published, and even then they still secreted their actions all they possibly could, and wholly concealed and secreted the fact that they were making an effort to obtain a mineral patent with the said *exception* as to a town site and surface improvements, above mentioned, left out; and that said Starr and his said co-conspirators stood by all the time they were obtaining said patent, from the 8th day of March, A. D. 1878, to the 29th day of March, A. D. 1879, the date of said patent, and witnessed from day to day these defendants and their grantors, and the other settlers on said lots and land included in said patent, expending tens of thousands of dollars in making improvements on said lots and town site, and in building up said city of Leadville, and thereby increasing the value of all kinds of real property in the same, and never in any manner warned or notified defendants and other settlers on said land and town lots that they were obtaining a mineral patent from the Government of the United

States, with said exception as to surface improvements left out, or otherwise, and which would enable said Starr and said plaintiff company to set up an absolute legal claim to the whole surface ground included in said mineral patent, and to all of the improvements made on the same by defendants and other settlers, as well as by said city itself; but on the contrary, the said Starr and the said Myers and Harrison, by themselves and by and through A. P. Hereford, their agent and attorney, after defendants and other settlers found out by other means than said notice that the same included land situated in said city and on said town site, assured defendants and other settlers on said lots and land, after the notice for said patent was published, that in case said patent should be obtained, that neither defendants nor any of the settlers on said lots would be disturbed or interfered with in their rights and possession, and that at most only a nominal sum would be expected or demanded of defendants and other settlers on said town site, and in no case to exceed $25 per lot, to assist in paying the necessary expenses of obtaining said patent; and advised defendants and other settlers as aforesaid to go on making their improvements and expending their money in building up said city; and defendants allege that said parties and plaintiff company caused said false and fraudulent reports and assurances to be circulated among said settlers to induce them all to continue making said improvements, and that defendants and others continued erecting buildings on said lots and making improvements on the same, until Starr obtained said patent, on the 29th day of March, 1879, and did so relying on said false and fraudulent promises and assurances, when, to the surprise and astonishment of defendants and other settlers on said lots and land, the plaintiff company gave notice in the papers of the city of Leadville that defendants and all settlers on said lots must appear

at once at the office of the attorney of plaintiff, in said city, and pay the full value of said lots, and the full value of all the improvements on the same, to the plaintiff company; and that all who neglected or refused to do so immediately would be ejected from their lots by law. That notice was published without giving defendants and other settlers any opportunity or chance to tender plaintiff the said nominal sum for said lots, and the said plaintiff wholly and absolutely denied and repudiated all of the promises and assurances made by its said officers and attorney, that said defendants and other settlers would, at most, only be expected to pay a nominal sum for said lots, and wholly refused to accept of the same from defendants and other settlers, when tendered by them, but demanded not only the full value of said lots and the improvements on the same, but demanded the most extravagant and exorbitant prices for the same, ranging at from $1,500 to $20,000 for single lots.

Defendants state, that relying on the said assurances and promises of the said Starr and the officers and attorney of plaintiff company, they expended not less than $5,000 in making improvements on said premises, from the time notice of the application for said patent was published until the same was obtained by said Starr, in addition to all the improvements made on the same prior to the publication of said notice.

Defendants allege that the said Starr and the said officers and attorney of plaintiff company falsely, fraudulently, and for the purpose of deceiving and misleading defendants and other settlers on said lots and town site, made said false promises and assurances to lull defendants and other settlers to sleep as to their danger and the real purposes and intentions of said conspirators to wrong and defraud defendants and other settlers, as aforesaid, and to induce defendants and other settlers on said lots not to

adverse or make any opposition to the application of said Starr for said patent in the Land Office, and to prevent defendants and other settlers from finding out and exposing the fraud, perjury and tricks of said conspirators in said Land Office before they should succeed in obtaining said patent; and that said conspirators went just as far as they could in such assurances and promises so as not to make definite and binding contracts with defendants and other settlers on said lots and land, but intentionally avoided making binding contracts, as aforesaid, in order to be able to defraud defendants and other settlers; and that said conspirators made said false promises and assurances for the further purpose of inducing defendants and other settlers to continue on making valuable improvements on said premises and said lots, and to continue building up said town or city, and largely increasing the value of the same, so that said conspirators might wrong and defraud these defendants and other settlers out of the same whenever said patent should be obtained; and defendants allege, that said false promises and assurances did deceive them and all other settlers on said lots, and lull them to sleep as to their danger and the wrongful and fraudulent purposes and intentions of said conspirators, and induced these defendants and other settlers on said lots and town site to go on expending their money in making improvements, and also induced defendants and other settlers to refrain from any and all attempts to find out the real facts and to adverse or oppose the said application for said patent in said Land Office; all of which defendants and other settlers were thereby induced to refrain from doing.

That, although the said plaintiff company and said Starr wholly repudiated their said promises and assurances, and wholly refused to fix any nominal sum for defendants and other settlers to pay for said lots, or enter

into any definite or binding contracts, after said patent was obtained, and peremptorily demanded the most extravagant prices for said lots and said improvements made by defendants and other settlers themselves, and, although defendants and other settlers had no opportunity to tender said sum of money, and were under no legal or equitable obligation to do so, yet defendants state that themselves and other settlers all tendered plaintiff company not only the said sum of $25 for each lot, which was to be the utmost demanded, according to said assurances and said promises, but also tendered much larger sums for said lots rather than be subjected to the expense and trouble of litigation; but the said Starr and plaintiff company, through its said officers and attorney, wholly refused to receive the same, or to settle or compromise said matter in any manner, but demanded the utmost price for said lots and improvements and the premises in question in this action, and, in order to recover the same and consummate said fraud and object of said wrongful conspiracy, as above alleged, commenced this action against defendants, and also similar actions against all other settlers on said lots and land, to the great wrong, damage, oppression and harassment of defendants and other settlers, as aforesaid, on said lots and land.

These defendants therefore allege, that said plaintiff company is wholly estopped, both at law and in equity, from having and maintaining this action against them.

V. Counter-claim.

And, for a further defense to this action, defendants state, that themselves and their grantors, while holding and occupying said premises mentioned in said complaint, under color of title adversely to the claims of the plaintiff, and in good faith, made valuable improvements on the same up to the 23d day of May, A. D. 1881, of the

value of $10,000; and that defendants have, since the said 23d day of May, 1881, up to the present time, made improvements on said premises of the value of $10,000. That defendants will, in pursuance of the statute in such case made and provided, and without a waiver of their right and claim as the owners of said premises, demand a judgment for the value of said improvements on the trial of this action, in case the right to the possession and title of said premises shall be decided against defendants. Defendants will, in that case, demand a judgment for $20,000 and costs of suit.

T. A. Green,
Attorney for Defendants.

To which third amended answer the plaintiff filed a demurrer, in the words and figures following, to wit:

The said plaintiff company demurs to that portion of the third amended answer of the said defendants filed herein, and called in said third amended answer, the defendants' second defense and third defense and fourth defense or estoppel, and fifth defense or counter-claim, containing all that portion of the said third amended answer, setting up and alleging new and affirmative matter as defenses, and for grounds of demurrer alleges:

That the said portion of said answer, nor either nor any part thereof, does not state or allege any facts sufficient to constitute any defense or any counter-claim to the cause of action set forth in the said complaint.

That said answer admits that the plaintiff is seized of a title in fee through a patent for the said lands from the United States to one Thomas Starr, and the supposed matters set forth in the said portions of said third amended answer, and which avers a superior possessory title in the defendants, and avers the location of a town site on the public domain; and avers that said land was

reserved from sale by act of Congress; and avers that said Thomas Starr was an alien and not a citizen of the United States; and attempts to aver the confederation and conspiracy of one Edwin Harrison and August Myers, and other officers of the said plaintiff company, to procure a patent by fraud, subornation and perjury; and avers that said Thomas Starr, Myers and Harrison made an agreement to consolidate certain placer mining claims and agreed that said Starr should be assisted by said Myers and Harrison to obtain said Starr patent, and that the said land in dispute should be deeded and conveyed to the said plaintiff by Starr; and avers that the said mining claims were pretended and fraudulent, and secret surveys were made for the same, and that the improvements on said lands were worth a million of dollars, and that it was necessary for said Starr to commit perjury and suborn other witnesses to commit perjury to obtain said patent; that said patent was obtained by committing perjury, and that said Starr swore falsely to being a citizen of the United States, and in swearing that he was in the actual and quiet possession of the said land, and had worked said claims ever since 1861; and avers that said Starr suborned one Hiram C. Vaughn and David Houghton to commit perjury, and that said Vaughn and Houghton made a false oath that said Starr had been in continued possession of the said land; and avers that the United States Land Officers should have inserted certain exceptions and reservations in the said Starr patent; and that by false and fraudulent representations, such exceptions were not put into the said patent, and that the said Starr and his confederates falsely represented to the Land Officers that said land was mineral land; and avers that the city of Leadville grew and increased in population from five to twenty thousand at the time said patent was issued, and the increase in extent of lots was great.

That said Starr was living in said city and saw the improvements made upon said lots, consisting of smelters, warehouses, banks, hotels, etc., and that said Starr and his grantors stood by and fraudulently kept quiet and allowed said improvements to be made, and confederated with said Myers and Harrison to secrete all their claims to the ownership of said lands; and that said Myers was the manager of the said plaintiff company, and lived in the city of Leadville and witnessed the erection of the buildings and the making of extensive improvements upon said land, but never notified the defendants or any other settlers that the said Starr or the plaintiff would make any claims to the said land; and there was no mining done upon said land, and that said Starr, Myers and Harrison, through A. P. Hereford, their agent, deceived the settlers on said land by stating that they would only expect a nominal sum for said lots after the issuance of said patent, and that said defendants, relying upon said false promises, did not oppose the issuing of said patent, but that they afterwards demanded exorbitant prices for said lots; and that said defendants made improvements upon said lots, relying upon said false representations; and avers that said settlers, by said false promises and assurances, were lulled to sleep as to their danger and the real purposes of said parties, to obtain said patent; and false promises and assurances were made for the purpose of inducing the defendants to continue making valuable improvements, and that they were deceived thereby and induced to refrain from filing adverse claims in the Land Office; and that, although said Starr wholly repudiated said promises and refused to fix a nominal sum for said lots, but demanded an extravagant price therefor, and the defendants and other settlers tendered $25 each for said lots; that said Starr and the plaintiff company wholly refused to receive the same or to settle the matter,

to the great wrong and damage of the defendants; do not nor do either or any of the said above mentioned matters constitute any defense or counter-claim of any kind to the cause of action and the matters set forth in the said complaint in this action.

That the said answer does not show with certainty when all or any of the improvements were made upon the said property, or any of the facts necessary to determine whether the said defendants are entitled to any counter-claim or set-off for any improvements whatever made upon the said premises.

SYMES & FOOT, and
THATCHER & GAST,
Attorneys for Plaintiff.

The Court sustained the said demurrer to said third amended answer, and defendants stood by their said amended answer, and judgment was entered for the plaintiff for possession of the premises and costs of suit; from which judgment defendants prosecute their writ of error; and they make the following assignment of errors, to wit:

JOHN STEELE, SARAH RAY *et al.*,
Plaintiffs in Error,
vs.
THE ST. LOUIS SMELTING AND REFINING COMPANY,
Defendants in Error.

In the Supreme Court of the United States.
October Term, A. D. 1882.

ASSIGNMENT OF ERRORS.

And now, the said plaintiffs in error come and say that in the record and proceedings aforesaid there are manifest errors, as follows, to wit:

I.

The Court below erred in sustaining the demurrer to the second defense set up in the third amended answer.

II

The Court below erred in sustaining the demurrer to the third defense set up in the third amended answer.

III.

The Court below erred in sustaining the demurrer to the fourth defense set up in the third amended answer.

IV.

The Court below erred in sustaining the demurrer to all of the special matter and special defense set up in said third amended answer.

V.

The Court erred in giving judgment in favor of said St. Louis Smelting and Refining Company, defendants in error, whereas it ought to have given judgment in favor of plaintiffs in error. Therefore, plaintiffs in error pray that said judgment may be reversed, annulled, and held for nothing; and that they may be restored to all things they have lost by reason thereof.

T. A. GREEN,
Attorney for Plaintiffs in Error.

BRIEF AND ARGUMENT.

I shall consider the errors assigned *seriatim.*

The Court below erred in sustaining the demurrer to the second defense set up in the third amended answer.

This part of the answer interposes as a defense that all of the land included in the patent was selected, occupied and used as a town site on the public domain, and within

the limits of an incorporated town, or city, and actually settled and occupied for the purposes of trade and business, and not for agriculture; and was included within the limits of an incorporated town or city, and so occupied long prior to the location of any of the pretended placer mining claims constituting the consolidated placer claim for which said patent was granted; and was, therefore, reserved from sale by the laws of Congress; and that the said patent was wholly void, because the officers of the Land Office have no power or jurisdiction to sell lands reserved from sale; and that such fact may be set up as a defense to a Government patent in an action at law.

This assignment of error raises the important question as to the nature and extent of town site rights on the public domain of the United States; and in some manner and to some extent, it may raise the question as to whether or not the town site laws of Congress extend to the *mineral* domain of the United States; but the answer alleges, and it is admitted by the demurrer, that the land in question is neither *mineral* or *agricultural*—its altitude is over 10,000 feet, and it is therefore, worthless for agricultural purposes, and it is admitted by the demurrer that it is not mineral land, and is wholly worthless for mining purposes; and it is alleged and admitted to be a natural town site, and a center of trade and business for the surrounding mining country, and only valuable as a town site. Notwithstanding all this, it will be maintained by the other side that the town site law of Congress does not extend to the mineral domain of the United States.

I maintain—first, that the facts alleged and admitted by the demurrer show affirmatively that the land in question was not, and is not, mineral land, and that the town site law does apply to this land, which is admitted to be a natural center of trade and business, and a natural and necessary town site, and neither fit nor valuable

for any other purpose; and secondly, if it even appeared to be mineral land, and valuable for mining purposes, still the town site laws of Congress do apply to it; and that the settlers acquired the same rights upon it that they would have acquired in any town site in any other part of the public domain.

The Court cannot assume that it is mineral land and a part of the mineral domain.

It must be borne in mind, that if it was a town site, then it was *reserved* from sale by the laws of Congress, and the placer mining patent obtained for the same was wholly void; and this objection may be interposed in an action of ejectment under all the authorities. Therefore, this is a vital question.

The Court below conceded, that if the town site laws of Congress apply to the mineral domain of the United States, that this defense was a good one, even in this form of action.

Chap. IV, Secs. 2257 and 2258, p. 417, Revised Statutes, U. S., provide:

"That all lands belonging to the United States to which the Indian title has been, or may hereafter be, extinguished, shall be subject to the right of pre-emption, under the conditions, restrictions and stipulations provided by law.

"The following classes of lands, unless otherwise provided for by law, shall not be subject to the rights of pre-emption, to wit:

"*First*—Lands included in any reservation by any treaty, law or proclamation of the President, for any purpose.

"*Second—Lands included within the limits of any incorporated town, or selected as the site of a city or town.*

"*Third*—*Lands actually settled and occupied for purposes of trade and business, and not for agriculture.*

"*Fourth*—Lands on which are situated any known salines or mines."

It is true that section 2257 was passed June 2, 1862, and section 2258, Sept. 4, 1841; but this law was made to extend to all lands to which the Indian title had been, or might thereafter be, extinguished. Besides, these four classes of reservations were all intended to apply in the future, and to all lands of the Government to which the Indian title might thereafter be extinguished. The reservation of lands on which mines were situated was repealed by the first mining laws of July, 1866 and 1872, throwing open the mineral lands for the purpose of exploration and purchase; but this in no manner interfered with the town site reservations, or limited the same to agricultural lands, or to any other portion of the public domain. In fact, town sites and centers of trade and business are absolutely necessary to all mining regions, much more so than to agricultural regions. A town site is a necessary incident to all mining districts. There must be stores, mills, smelters, hotels, shops, residences, and everything that goes to make up a town.

Then why should this wise law of Congress touching town sites and town reservations not be applied to the mineral domain, where it is most needed? But Chap. VIII of the Revised Statutes, p. 438, entitled "RESERVATION AND SALE OF TOWN SITES ON THE PUBLIC LANDS," puts this whole question at rest.

The first section, 2380, of this chapter, enacted the 3d of March, 1863, provides, that the President may reserve either surveyed or unsurveyed lands for town sites on shores of harbors, at junctions of rivers, etc., or any natural or prospective centers of population; and Sec. 2382, enacted July 1, 1864, provides:

"That, in any case in which the parties may have already founded, or may hereafter desire to found, a city or town on the public lands, it may be lawful for them to file with the recorder of the county in which the same is situated a plat thereof for not exceeding *six hundred acres*, exhibiting streets, squares, blocks, alleys," etc., etc., etc.

It will be seen, by a careful examination of this chapter, that there are several ways in which town sites may be selected and *reserved* on the public lands, and the people themselves may enter on the public lands, and select and appropriate and *reserve* town sites; or the President may reserve *town sites* on the public lands, the same as he may reserve lands for forts or other public purposes.

Sec. 2389, enacted 2d of March, 1867, provides:

"That, if a town site is upon surveyed lands, and the inhabitants are, in number, 100, and less than 200, it shall embrace not exceeding 320 acres; and where the inhabitants are more than 200, and less than 1,000, not exceeding 640 acres; and where the inhabitants are 1,000, and over 1,000, the town site shall not exceed 1,280 acres; and for each additional 1,000 inhabitants, but not exceeding 5,000 in all, 320 acres shall be allowed."

Sec. 2386 of this chapter, p. 439, enacted March 3, 1865, provides:

"That whenever mineral lands are possessed, which possession is recognized by local authority, and to the extent so possessed and recognized, the title to town lots to be acquired shall be subject to such recognized possession, and the necessary use thereof; but nothing contained in this section shall be so construed as to recognize any color of title in possessors for mining purposes as against the United States."

It will be noticed that this section was enacted before any law throwing open the mineral domain for explora-

tion and purchase; but this section clearly recognizes and specifically provides for town sites on the public mineral domain before it was thrown open for occupation and purchase for mining purposes by the mining laws of Congress.

Sec. 2387 of this same chapter, p. 439, enacted March 3, 1867, also provides:

"That whenever *any portion* of the public lands *have been*, or *may be*, settled upon and occupied as a town site, not subject to entry under the AGRICULTURAL *pre-emption* laws, it is lawful, in case such town site be incorporated, for the corporation authorities thereof, and if not incorporated, for the Judge of the County Court for the county in which such town is situated, to enter at the proper Land Office, and at the minimum price, the land so settled and occupied, in trust for the several use and benefit of the occupants thereof, according to their respective interests, the execution of which trust, as to the disposal of the lots in such town, and the proceeds of the sales thereof, to be conducted under such regulations as may be prescribed by the legislative authority of the State or Territory in which the same may be situated."

This section was enacted after the first act of July, 1866, throwing open the whole mineral domain of the United States for exploration and purchase, and shows a full and complete recognition, and positive provisions for town sites *on any portion* of the public lands.

It also adds the trustee system to the plans of locating town sites; but leaves all the different plans of selecting a town site in full force.

I have nothing to do with these different ways of selecting and locating a town site. I have only to show that this town site law applies to Leadville, or the land on which that city is located, no matter whether it be mineral

land or not, and my object will be accomplished; because if a town site, it was *reserved* from sale, and that renders the placer patent to Starr wholly void.

Section 2392 of this same chapter, page 440, and also enacted March 2, 1867, and after the passage of the first mining laws, provides:

"That no title shall be acquired under the foregoing provisions of this chapter to any mine of gold, silver, cinnabar or copper, or to any valid mining claim or possession held under existing laws."

This section also expressly recognizes town site rights on the public mineral domain, but provides that no mining rights shall be acquired under the town site laws, and, therefore, town site rights and mining rights may separately exist in and to the same land; and right here arises the question in the present case, as to whether or not the town site right to the surface is not absolutely good and paramount to the surface, and the placer mining patent to Thomas Starr, good for any mineral there might be under the ground; but the fact is, there never was any mineral at all in this land occupied by the town site, and never any mining at all done on it. It was patented by Starr and his confederates, solely for a town site and for speculation in town lots, and is all so used to this day. It is alleged in the answer, and admitted by the demurrer, that this is not mineral land, and wholly worthless for mining purposes; and therefore, in any event, the patent is worthless, unless held good by this Court as a town site patent; but even if this Court will conclusively presume there is mineral, and that it is good as a mineral patent, it does not follow that it is good as against the town site rights, for these rights are wholly distinct and separate under the laws of Congress, and may both exist in the same land at the same time.

Section 2393, enacted March 2, 1867, reserves from these town site provisions all military reservations, and all lands used for public purposes; and Sec. 2394 provides:

"That the inhabitants of any town located on the public lands, may avail themselves of the provisions of Sections 2387, 2388 and 2389, etc., etc.; but provides that nothing contained in these sections shall prevent the issuance of patents to persons who have, or may thereafter, make entry, and elect to proceed under the laws relative to town sites in said chapter."

The Court below placed considerable stress on the fact that Sec. 2258, page 417, which provides that lands included within the limits of an incorporated town, or selected as the site of a city or town, shall be *reserved* from sale, was enacted as long ago as September 4, 1841; but the presiding Judge wholly forgot that all of the laws contained in the Revised Statutes of the United States were re-enacted on the 22d day of June, A. D. 1874; but the age of the law does not affect its validity.

From the above outline of the laws of Congress touching town sites, it will be clearly seen that the Court below erred in holding that such laws did not apply to the mineral domain of the United States, and that the law reserving town sites and lands used and possessed for the purposes of trade and business, have no application to mineral lands or lands not mineral within the bounds of mineral lands.

The Land Department holds that the town site laws do apply to the mineral domain, and I believe has so held for many years. See—

Sickel's Mining Law, p. 302.

And the present Secretary of the Interior, Hon. H. M. Teller, has so held in several cases since he took charge of that department.

The Land Department holds that towns and cities and centres of trade and business are absolutely necessary to a mining country, and this is self-evident; and as there is plenty of room for towns, cities and mining purposes on the vast mineral domain, why should the wise and salutary town site laws not be extended to the same?

In the case of Morton vs. Nebraska, 21 Wallace, 660, this whole subject is discussed as to the reservation of salt springs and town sites, and the portions or clauses of section 2258, which apply to town sites and salt springs, Justice Davis delivers the opinion of the Court, and says that ever since the Louisiana purchase, and since the Government had public lands, it has been its policy to reserve town sites, salt springs, etc., etc. It would be strange indeed, if Congress were to pass laws to sell town sites and prospective centres of trade and commerce and business at the same price as common agricultural or mineral lands, and it would be stranger still if Congress ever intended to sell cities like Leadville, with from 10,000 to 20,000 people, and worth from $5,000,000 to $10,000,000 at $2.50 per acre. Under the town site laws of Congress, the land on which Leadville is built was worth to the Government from $500 to $10,000 per acre, and Congress certainly never intended to sell it to speculators at $2.50 per acre, to be used as a city or town site. There is not in all the legislation and laws touching the public domain of the United States a more wise or salutary law than that reserving town sites and centres of trade—harbors and the like—from sale. I ask a careful examination of this case in 21 Wallace, as it covers the whole substance and spirit of the law in this record, and also re-affirms the doctrine that all patents issued for lands reserved from sale, are wholly void; and that this may be set up as a defense in actions at law—in ejectments—as a defense to a Government patent.

II.

Having hastily reviewed the laws of Congress touching town sites on the public domain, I shall set out in full all the laws of the State of Colorado, which I wish to refer to in this discussion, and which may apply to all the assignments of error.

CHAPTER EIGHTY-THREE, P. 713, GENERAL LAWS OF COLORADO.

"SEC. 2124. Conceding to the United States of America the primary and paramount right to dispose of the soil of this State according to the laws existing or to be enacted by Congress, and full and complete exemption from every form of taxation of their property, it is hereby declared that as between all the good citizens now residing in, or who shall hereafter come to reside in this State, and as between them, or any of them, and others, having or claiming, or now or hereafter pretending to have or claim any right to occupy, possess or enjoy any portion of the public domain, situate within the boundaries of this State, and as between each and every of them, and all other persons, associations, corporations and powers, except the Government of the United States of America, the right as the same may exist under the local laws, to occupy, possess and enjoy any tract or portion thereof, shall be respected in law and equity in all the Courts and tribunals of this State.

"SEC. 2126. The owner of every claim or improvement, on every tract or parcel of land, has a transferable interest therein, which may be sold in execution or otherwise, and any sale of such improvement is a sufficient consideration to sustain a promise.

"SEC. 2127. All rights of occupancy, possession and enjoyment of any tract or portion of the said public do-

main, acquired before the 7th day of November, A. D. 1861, shall be ascertained, adjudged and determined by the local law of the district or precinct in which such tract is situated, as it existed on the day when such rights were acquired, or as it thereafter may have existed; and if there were no local laws at that time, then by the common custom then prevailing in respect to such property in the district or precinct in which it existed. All such rights of occupancy, possession and enjoyment acquired since the 7th day of November, A. D. 1861, shall be ascertained, adjudged and determined by the laws of this State in force at the date of such acquisition.

"SEC. 2129. In all legal or equitable proceedings hereafter instituted in any Court in this State, the record of any declaration, deed or mortgage, or other muniments of right, referred to in the third and fifth sections of this chapter, shall be received, except as against the United States, and all persons claiming under the United States, as presumptive evidence of the regularity of the paper itself, under the local law or custom existing at the time of its execution; and if the regularity thereof be challenged, the burden of proving the alleged irregularity shall rest upon the party making the challenge.

"SEC. 2130. The declaration of every occupant of any tract or portion of the public domain, mentioned in section five of this chapter, shall not be construed to include any gold-bearing quartz lodes, silver lodes or gold diggings; but said lodes and diggings shall be excepted from the tract of said occupant, and shall be subject to be occupied, possessed and enjoyed, as hereinafter provided.

"SEC. 2131. Any person settled upon any of the public lands belonging to the United States may maintain trespass *quare clausum fregit*, trespass, ejectment, forcible

entry and detainer, unlawful detainer and forcible detainer, for injuries done to the possession thereof.

"SEC. 2132. On the trial of any such cause, the possession or possessory right of the plaintiff shall be considered as extending to the boundaries embraced by the claim of such plaintiff, so as to enable him to have and maintain either of the aforesaid actions, without being compelled to prove an actual inclosure. *Provided*, that each claim shall not exceed in any case 160 acres of land.

"SEC. 2133. Every such claim, to entitle the holder to maintain either of the aforesaid actions, shall be marked out so that the boundaries thereof may be readily traced, and the extent of such claim easily known; and no person shall be entitled to maintain either of said actions for possession of, or injury done to, any claim, unless he occupy the same, or shall have made improvements thereon to the value of $100.

"SEC. 2135. Any person who may have a title to occupy any lot, or lots, within any city or village plat, or any lots or mining claim within any mining district in this State, in virtue of a certificate, deed of gift or purchase from the original claimant, or claimants, or their assigns, as well as all purchasers, under any decree or execution of any of the so-called Provisional Government Courts, people's or miner's Courts, of the lands situate within any city or village plat, or any lots, lands or mining claims situate within any mining district, together with the original claimant, or claimants, of said lots, lands or mining claims, shall be entitled to maintain the actions authorized by the eighth section of this chapter against any and all persons who shall enter upon and occupy said lots, lands or mining claims, or any of them: *provided*, it shall be lawful for the citizens of any mining

district to declare an abandonment of any creek, river, gulch, bank or mining claim a forfeiture of the rights of the claimants thereto, in which case the parties claimant shall not be enabled to maintain either of the actions mentioned in Sec. 8 of this chapter.

"Sec. 2138. Whenever any improvements may be made upon any claim held or used for arable or pastoral agriculture, or upon any building lot, mill site or other lot or premises, and any person or persons shall demand of the claimant thereof to mine any portion of said claim upon which such improvements may have been made, it shall be lawful for the occupant or holder of such claim to require a good and sufficient bond, in a sum double the value of the improvements upon the land sought to be mined, from the party or parties demanding to mine upon such claim, with two or more sureties, to be approved by any justice of the peace of the township in which the claim is situate, conditioned that the said party or parties shall pay all damage which may be sustained by the occupant or holder of such claim, to the improvements thereon."

General Laws of Colorado, p. 600.

An act limiting the time for bringing actions respecting real estate.

"Sec. 1694. That every person in the peaceable and undisputed possession of lands or tenements, including mining claims, under claim and color of title, made in good faith, including pre-emptions made in accordance with the laws of the State of Colorado, or any mining district wherein such property may be situate, who shall, for five successive years hereafter continue in such possession, and shall also, during said time, pay all taxes legally assessed on such lands, tenements or mining

claims, shall be held and adjudged to be the legal owners of said lands, tenements or mining claims, to the extent and according to the purport of his or her proper title or pre-emption. All persons holding under such possession by purchase, devise or descent, before said five years shall have expired, and who shall continue such possession, and continue to pay the taxes as aforesaid, so as to complete the possession of and payment of taxes for the term aforesaid, shall be entitled to the benefit of this section.

"SEC. 1695. Whenever a person having color of title, either by pre-emption or otherwise, as aforesaid, made in good faith to vacant and unoccupied land or mining claims, shall pay all taxes legally assessed thereon, or for improvements situate thereon, for five successive years, he or she shall be deemed and adjudged to be the legal owner of said vacant and unoccupied lands or mining claims to the extent and according to the purport of his or her proper title or pre-emption. All persons holding under such taxpayer, by purchase, devise or descent, before said five years shall have expired, and who shall continue to pay taxes as aforesaid, so as to complete the payment of the taxes for the term aforesaid, shall be entitled to the benefit of this section; *provided, however*, that if any person having a better paper title or pre-emption to said vacant and unoccupied lands or mining claims, shall during the said term of five years, pay the taxes assessed on said lands or mining claims, or improvements thereon, for any one or more years of the said term of five years, then, in that case, such taxpayer, his heirs and assigns, shall not be entitled to the benefit of this section.

"SEC. 1696. The two preceeding sections shall not apply to lands or tenements owned by the United States, except as to the possessory rights of parties claiming to hold such lands or mining claims under and in accord-

ance with the laws of the United States, the laws of this State, and the mining laws, regulations and customs of the several mining districts wherein such land or mining claims may be situate, nor to land held for the use of any school or seminary, or for the use of any religious society, nor to land held for any public purpose. Nor shall they extend to any lands, tenements or mining claims, when there shall be color of title by purchase or pre-emption in another to such lands, tenements or mining claims, and the holder of such title is under the age of twenty-one years, insane or imprisoned; *provided*, such person shall commence an action to recover such lands or mining claims so claimed as aforesaid, within one year after such disability shall cease to exist, and shall prosecute such action to judgment; and in case of vacant and unoccupied land shall, also within one year, pay to the person or persons who paid the same, or to the treasurer of the county wherein the land is situate, for the use of such person or persons, all the taxes paid by such person or persons on said land or improvements, with interest thereon from the date of such payments at the rate of twenty-five per cent. per annum. Nor shall said section extend to or apply to any mining claims, the title of which may be derived from pre-emption under and by virtue of the provisions of the law of the United States, approved May 10, 1872, in reference to the forfeiture of mining claims by failure to improve the same.

"SEC. 1697. In all cases at law or in equity brought to recover the possession of any lands, tenements or mining claims, except in action of ejectment, the party defendant may plead such possession, payment of taxes aforesaid, in bar of such action, and on failure to plead such possession and payment of taxes, the right of the said defendant to avail himself of the benefit of said statute shall be deemed waived by the said defendant."

NOTICE OF POSSESSORY RIGHTS.

Section 1453, page 537, General Statutes of Colorado, provides:

"Every interest in land, legal and equitable, shall be subject to levy and sale under execution, and the claim or possessory right of any defendant in execution in or to any public lands, may be levied upon and sold under execution, in the same manner as if the same were held by such defendant in fee simple; *provided*, that nothing in this chapter contained shall be so construed as to give any plaintiff in execution the right to levy on any land filed on by any person, in the Land Office of the Colorado Land District, and occupied as a homestead by the defendant in execution."

INCORPORATED TOWNS OR CITIES.

Sec. 2743, p. 918, General Statutes of Colorado, provides:

"Any city or town which has been formed, organized or incorporated previous to the passage of this act, or which may hereafter be formed, organized or incorporated, and have exercised, or shall exercise, the rights and powers of a municipal corporation, and shall have in office a board of officers exercising the duties of their offices, and the legality of the formation or organization shall not have been, or shall not be, legally denied or questioned within one year from the date of its formation or organization, shall be deemed to be a legally incorporated city or town, and its formation, organization or incorporation shall not thereafter be questioned."

SUGGESTIONS.

I have set forth the above laws of Congress and laws of Colorado, to show the full motive and extent of all *posses-*

sory rights on the public demain in the State of Colorado. The laws of Congress provide, that the laws passed by the Legislatures of mining States and Territories not in conflict with the laws of Congress, shall have full force and effect; and, therefore, such laws of Colorado, when not in conflict with the laws of Congress, have the same force in said State as the laws of Congress themselves.

See Revised Statutes U. S., Secs. 2322, 2324, pp. 427, 428.

The above laws of Colorado will show that all *possessory* rights on the public domain in that State are clothed with all the characteristics of *real estate* known to the law.

These *possessory* rights are subject to execution and sale, and redemption from sale, the same as all other real estate, and this includes all kinds of mining claims and town lots held under possessory titles.

Sec. 26, p. 141, of General Laws of Colorado, provides:

"That the *terms* '*land*' and '*real estate*,' as used in this chapter, shall be construed as co-extensive in meaning with the *terms* 'lands,' 'tenements,' 'hereditaments,' and as embracing *mining claims and other chattels real*."

All of the real estate in the city of Leadville has for many years been taxed as real estate for city, county and State purposes, and was so taxed long before the issuance of this patent to Starr, and this whole town site is treated the same under the laws of Colorado as the city of Denver, where titles are absolute. The laws of Colorado also provide, that these possessory rights are *legal* rights, and that any person settled on any of the public lands belonging to the United States may maintain *trespass quare clausum fregit*, or *trespass, ejectment or forcible entry and detainer* for injuries to the possession thereof.

See Sec. 2131, p. 715, General Laws of Colorado, above set forth.

It will also be seen that the statutes of limitation above set out apply to all of these possessory rights, as against the whole world, except the Government of the United States, and, under the laws of Colorado, these *possessory* rights are as fully and completely *vested rights* as any other rights touching real estate in the said State of Colorado, as against everybody, except the Government.

I therefore maintain that all of these possessory rights in the State of Colorado, amounting to millions of dollars worth of property, and growing out of the laws of Congress and the laws of Colorado, made in pursuance of the laws of Congress but not in conflict with the same, are derived from a *common and paramount source* of *title*, the same as *mineral* patents, and that the owners of these rights are as fully entitled to a hearing in our courts as the holders of government patents; and that this should be the proper construction of this whole doctrine of paramount source of title since the passage of the mining laws in 1866, throwing open the mineral domain for exploration and purchase; and although it may not be absolutely necessary under this assignment of error to show what the real rights of the settlers in the Leadville town site are under the laws of Congress and of this State, yet this is, to some extent, an important question under this head. It is true, that if the land was reserved from sale by the laws of Congress, the patent to Starr is absolutely void, and any body at all holding any kind of possession may attack it in any kind of an action; but our Code provides that "a defendant, in an action of ejectment, may state generally the character of the estate he claims in the premises, or *any right of possession or occupation he claims.*"

Colorado Code, Sec. 250, pp. 97–98.

I maintain that, under the facts alleged in the second defense, which I am now considering, that the defen-

dants have not only a good and valid title—possessory title—to the premises in question, but a better title than Thomas Starr or his grantees, who took with notice and while defendants were in actual possession of said premises. The facts alleged and admitted by the demurrer, show that Thomas Starr was an alien, who had never declared his intention to become a citizen, and could, therefore, acquire no right at all; but this matter will be fully discussed under my second assignment of error, although it would be proper to discuss it here.

The facts alleged and admitted in this second defense, show that the land in dispute was selected, occupied and possessed as a town site long prior to any pretended location of the same by Thomas Starr or any of his grantors, as placer mining ground; and that as he was an alien, he could acquire no possessory right whatever to the same, even if he had located it, and as he could not as an alien acquire any possessory right, that he could acquire no right as a patentee. As before stated, this question will be fully discussed, and the authorities examined on this question, under my next head.

Upon this head, I maintain that all the land on which Leadville is situated was selected, used and possessed as a town site, and was within the limits of an incorporated city. These facts are all alleged in the answer and admitted by the demurrer, and come clearly within the provisions of the law of Congress reserving town sites from sale; and all of the authorities are to the effect that the officers of the Land Department have no power to sell lands reserved from sale, and that all patents issued for such lands are wholly void. I hardly deem it advisable to refer to the authorities on this point, but will, as a matter of precaution, do so, and cite the following:

Polk's Lessee vs. Wendell, 9 Cranch, 87–99.
The same case again before the Court, 5 Wheaton, 301 to 312.
Patterson vs. Winn, 11 Wheaton, 380 to 391.
Jackson *ex dem.* Maneins vs. Lawton, 10 Johnson, 22 to 25.
Minter vs. Cummelin, 18 How., 88.
Stoddard *et al.* vs. Chambers, 2 How., 284-318.
38 Cal., 80.
20 Cal., 420.
16 Cal., 296.
3 Washburn, Real Property, 279.
6 McLean, 93.

The Court below certainly erred in sustaining the demurrer to this second defense; and the only distinction I can see between town sites on agricultural and mineral lands is, that, on mineral lands, the reservation from sale would only extend to the surface ground, perhaps, under Sec. 2392, p. 440, Revised Statutes, which provides:

"That no title shall be acquired under the town site law to any mine of gold, silver, cinnabar or copper, or to any valid mining claim or possession held under existing laws."

This section was passed 2d of March, 1867, and, I presume, only applied to mines or mining rights then existing; but, even if it applies to the present case, it can only affect the mines or mineral in this land; and it is admitted by the demurrer that there are no mines on this ground, and that it is not mineral land, and is of no value for mining purposes, and which are the actual facts in the case.

II.

I again call attention to that clause of Sec. 2258, p. 417,

Revised Statutes, U. S., which provides for the reservation of town sites.

It first provides, that all lands included within the limits of an incorporated town shall be reserved, and lands *selected* as the site of a city or town; and *thirdly*, lands *actually settled and occupied* for purposes of trade and business, and not for agriculture.

The allegations of the answer bring the land in question within all of these reservations, and the demurrer admits all of these facts, and that this selection, occupation and the incorporation of the town or city was long prior to any pretended right of location, even by said Starr.

The Supreme Court of the United States, through Justice Davis, in the case of Morton vs. Nebraska, 21 Wallace, p. 670, specially refers to lands occupied for the purposes of trade and commerce, as being reserved; and, at page 673 of same case, the Court refers to town sites as still being reserved; and this case was decided at the October term, 1874, of this Court, and shows that this whole law touching the reservations of town sites, etc., was in full force at that time, and it will be seen that this sweeping decision has been made since the passage of all the mining laws of Congress and since the passage of the whole chapter of town sites; and that all of both, the mining and town site laws, were the same at the date of that decision that they are now; and the whole spirit and tenor of that decision is in support of these reservations, and their extension to the entire public domain. There is nothing at all in the mining and town site laws themselves or in this late decision to justify, in the remotest manner, the conclusion that these town site laws do not extend to the mineral domain of the United States; but, on the contrary, the laws themselves are clear aud positive that they do so extend, and that they are in full force, and the whole tenor of the case just referred to is to the

effect, that these laws are wise and salutary, and should be liberally construed by this Court. The decision is made in the clause touching *saline* lands, but the town site and other reservations are referred to and explained and recognized as still in full force.

III.

How Town Sites on Public Domain are Selected.

An examination of the chapter on town sites, page 438, Revised Statutes, will show that people may enter upon the public domain and select and occupy, and appropriate land for a town site, or for trade and business, and that such land at once becomes reserved from sale by the selection and occupation of the same as a town site, and the laying off the same into streets, alleys, blocks, squares, etc.

In the present case, it is alleged in the answer and admitted by the demurrer, that all of the land included in said patent was included within the limits of an incorporated city or town, and was selected, used, occupied and appropriated for a town site long prior to even the location of the pretended placer mining ground and claims included in said patent; and that the said Starr was an alien and subject of Great Britain, who had never declared his intention to become a citizen of the United States, and, therefore, could not acquire any possessory rights to the land in question, even if he had properly located all the consolidated claims, or pretended placer mining claims, included in said patent. It must be remembered that there are some ten or twelve different locations, or pretended locations, consolidated into one claim, and all included in said patent.

The answer also alleges a city government, and the assessment of the property for city, county and state purposes, and that there was a city or town site on said land

of from 16,000 to 20,000 people, with public buildings and improvements worth vast sums of money; and the answer also alleges that the possessory rights of plaintiffs in error have been quieted by the statutes of limitation under the statutes of Colorado.

If it be possible to allege a state of facts constituting a town site or city on the public domain and reservation from sale of the same under the laws of Congress, it has been done in the case at bar; so that no question of fact can arise, and this defense rests wholly upon the construction of the town site reservation acts of Congress.

Further Examination of Town Site Acts.

It is proper that I should make a further explanation of the different provisions and sections of the town site law.

See Chapter 8, page 438, Revised Statutes U. S.

It seems the first town site act was that of May 23, 1844, which was entitled "An act for the relief of citizens of towns upon lands of the United States under certain circumstances," commonly called the town site act of 1844, is familiar to the Court. It provided a system of trusteeship by which the corporate authorities of the town, if incorporated, or the Probate Judge of the county, if it was not incorporated, might enter the lands occupied by the town, not exceeding 320 acres, and purchase the same at the minimum price (one dollar and twenty-five cents per acre) in trust for the several use and benefit of the occupants thereof, according to their respective interests, the execution of which trust as to the disposal of such lots in such town and the proceeds of the sales thereof, to be conducted under rules and regulations to be prescribed by the Legislature of the State or Territory in which the same is situated.

Vol. 5 United States Statutes at Large, Chapter XVII, page 657.

This act of 1844, was repealed by the act of July 1, 1864, which was entitled "an act for the disposal of coal lands and town property on the public domain," and which abolished the whole trustee system of obtaining titles to town site lands, and made extensive changes not only in the mode of procedure, but also in the terms upon which such lands should be sold by the United States. The first section relates exclusively to coal lands. The second section provides that where parties have already founded or may hereafter desire to found a city or town on public lands, they may prepare a plat of the town, not exceeding 640 acres, showing the boundaries of the town, its name, its streets, squares, blocks, lots and alleys, verified by affidavits, and file one copy in the recorder's office of the county where the town site is situated, another copy in the land office of the district, and a third copy in the General Land Office, whereupon the President may offer the lots embraced within the limits of the town at public sale, at a minimum of ten dollars for each lot; lots not sold at the public sale to be liable to private entry at said minimum, etc.; and provided that any actual settler, on any one lot, and on any additional lot on which he may have substantial improvements, may prove up and purchase the same as a pre-emption at said minimum, at any time before the day for the public sale. Section 3 refers to the adjustment of the boundaries to the public surveys. Section 4 authorizes the Secretary of the Interior, in case the parties interested fail to file such plat in the General Land Office, to have such plat made and dispose of the lots at an increase of fifty per cent. on said minimum of ten dollars a lot. Section 5 we quote entire:

"And be it further enacted, that effect shall be given to the foregoing act according to such regulations as may be prescribed by the Secretary of the Interior. The act entitled, 'an act for the relief of the citizens of towns upon the lands of the United States under certain circumstances, May 23,' 1844, and all other acts and parts of acts inconsistent with this act be, and the same are hereby repealed."

U. S. Statutes at Large, Vol. 13, Chap. CCV, p. 343.

In accordance with this act, the Commissioner of the General Land Office, on the 20th day of August, A. D. 1864, issued a circular of instructions calling attention to the law and giving it effect.

By this act, Congress wiped out the previous system of obtaining title to town site lands through a trustee, fixed a uniform maximum size of town sites at 640 acres, which was an enlargement of the size fixed by the act of 1844, established the price of lots at $10 each, provided for the sale of lots at public sale, and a method by which each actual settler on one lot might obtain a patent for that lot and any additional lot on which he had substantial improvements, purchasing the same at $10 a lot as a preemption, in which case the patent issues directly to him without the intervention of any trustee. The act of 1844 was repealed by name, and also all other acts and parts of acts inconsistent with the new system now provided.

Sec. 2382, of Chap. VIII, Revised Statutes, U. S., all reenacted as a body on the 22d day of January, 1874, and entiled "RESERVATION AND SALE OF TOWN SITES ON PUBLIC LANDS," is the section on which we especially rely. It was first enacted July 1, 1864, and provides as follows, to wit:

"In any case in which parties have already founded, or

may hereafter desire to found, a city or town on the public lands, it may be lawful for them to cause to be filed with the recorder for the county in which the same is situated a plat thereof, for not exceeding 640 acres, describing its exterior boundaries according to the lines of the public survey, where such surveys have been executed; also giving the name of such city or town, and exhibiting the streets, squares, blocks, lots and alleys, the size of the same, with measurements and area of each municipal subdivision, the lots in which shall each not exceed 4,200 square feet, with a statement of the extent and general character of the improvements, such map and statement to be verified under oath by the party acting for and in behalf of the persons proposing to establish such city or town; and, within one month after such filing, there shall be transmitted to the General Land Office a verified transcript of such map and statement, accompanied by the testimony of two witnesses that such city or town has been established in good faith, and, when the premises are within the limits of an organized land district, a similar map and statement shall be filed with the register and receiver, and, at any time after the filing of such a map, statement and testimony in the General Land Office, it may be lawful for the President to cause the lots embraced within the limits of such city or town to be offered at public sale to the highest bidder, subject to a minimum of $10 for each lot; and such lots as may not be disposed of at public sale shall thereafter be liable to private entry at such minimum, or at such reasonable increase or diminution thereafter as the Secretary of the Interior may order from time to time, after at least three months' notice, in view of the increase or decrease in the value of the municipal property. But any actual settler upon any one lot, as above provided, and upon any additional lot in which he may have substantial improve-

ments, shall be entitled to prove up and purchase the same as pre-emption, at such minimum, at any time before the day fixed for the public sale."

Sec. 2394 provides:

"That the inhabitants of any town located on the public lands may avail themselves, if the town authorities choose to do so, of the provisions of Secs. 2387, 2388 and 2389; and, in addition to the minimum price of the lands embracing any town site so entered, there shall be paid by the parties availing themselves of such provisions all costs of surveying and platting any such town site, and expenses incident thereto incurred by the United States, before any patent issues therefor; but nothing contained in the sections herein cited shall prevent the issuance of patents to persons who have made, or may hereafter make, entries, and elect to proceed under other laws relating to town sites in this chapter set forth."

The above section provides that the inhabitants of a town site on the public domain may avail themselves of sections 2387, 2388, 2389, if the *town authorities choose to do so.* This is wholly optional. I might suggest that there is no limitation or neglect on the part of the people of Leadville, or the town authorities of that city, to bar them or it of any of their town site rights on the public domain. A town site is not bound to even adverse an application for a patent, as such rights are not included in the claims, which are designated in the statutes as adverse claims; but the Land Office has held that a town site *may* be interposed as an adverse claim in the Land Office if the city, town or inhabitants wish to do so, but they have a right to rely for protection on the rule of the Land Office, which requires all town sites and surface improvements to be reserved in all mineral patents, and which was fraudulently and intentionally left out of this

patent, as alleged in the third defense; and which will be discussed in its proper place.

Of course, if, as I maintain, the land included in this patent was *reserved* from sale and the patent wholly void for that reason, there was no use of adversing a void procedure in the Land Office; and the whole proceeding was absolutely void from the beginning to the end. Nor is the fact that Starr was an alien a matter of adverse or a question which could be heard upon an adverse claim; and if it could be raised at all in the Land Office, it would be upon a protest, and not upon an adverse claim. This whole question of the alienage of Starr will be considered under my second assignment of errors, where it more properly belongs; and I hope to be able to show that that fact alone renders the patent not only voidable but absolutely void, and that the officers of the Land Office have no power or authority to sell the public domain of the United States to aliens who have not declared their intention to become citizens of the United States; and that it is not the duty of the officers of the Land Office to pass *judicially* upon that question, and that their action upon that question is not conclusive in any form of action at law, or suit in equity.

As there is nothing in the acts of Congress limiting the town sites to agricultural or any other kind of public land, or excluding their application from the mineral domain, the Courts should not limit the application of such laws.

If there be nothing in a statute to limit its general words, they must have general effect; Courts cannot arbitrarily add to or subtract from them.

Tynan vs. Walker, 35 Cal., 364.
Harrington vs. Smith, 28 Wis., 43.
People vs. Purdy, 2 Hill (N. Y.) 35.

In enacting the law of July 1, 1864, Congress had before it the whole question of granting titles to town site lands on the public domain, and was legislating on that matter to cover the whole subject. The very title of the act, "An act for the disposal of coal lands and town property in the public domain," shows this. It provided a new system, differing *toto coelo* from the one previously existing, not only in the mode of procedure, but in the substance of the sale itself, embracing past cases where parties had already founded, as well as future ones where they might thereafter found a city or town.

There is not a single reason why the town site laws should not extend to the mineral domain, but the very best of reasons why they should. There is not a word or sentence to be found in the laws themselves—neither in the town site or in the mining laws of Congress—to justify the limitation of these town site laws on the public domain, or to limit the same to any particular part of the public domain. It is true, that Secretary Schurz, who was no lawyer, and who had no correct judgment of any kind in regard to our mining laws and mineral domain, did make a ruling that town sites could not be allowed on placer mining ground; but his successor, Secretary Teller, who is one of the ablest mining lawyers in the United States, and lives in a mining State, and has had about twenty years' experience in mining law and the practical workings of our mining laws, did, on the 22d day of September, 1882, reverse Secretary Schurz's ruling in this regard, as well as in some others, and issued an order to the different land offices in the mining States and Territories recognizing town sites on placer mining claims. This order will be set out in full hereafter, and the attention of this Court called to it for several purposes.

It should be remembered that under the mining and town site laws of Congress, no distinction is made in this

respect between *lode* mining ground and placer mining ground, and if the town site law applies to one, it also applies to the other, and it certainly applies to the whole mineral domain without limitation.

Second Assignment of Errors.

The Court below erred in sustaining the demurrer to the third defense set up in the answer.

This defense, or the facts alleged in it, will divide themselves into two distinct defenses.

It alleges that Thomas Starr was an alien who had never declared his intention to become a citizen of the United States, and, therefore, the patent issued to him was not only voidable, but wholly void.

It also, in connection with the above allegation, sets up a whole series of facts, such as willful and corrupt perjury on the part of said Starr himself, and also subornation of perjury and bribery, constituting a most aggravated defense of fraud in obtaining the patent, both upon the Government itself as well as upon the rights of the settlers on the Leadville town site. I shall consider these defenses separately, and the question of fraud first. I am fully aware that I will be met on the very threshold of my argument here with the stern fact that this Court has decided again and again that no such defense can be interposed to a Government patent in a Court of law, but I maintain that no such case as the one at bar has ever before been presented to this Court; and that there is very largely a misapprehension as to the numerous decisions on this point, and that very few if any of them apply to the facts of this case, and that really no such case as this has ever been decided by this Court; and if it has, the decisions of this Court are open to review and reconsideration, and especially so in all of the complicated

and difficult questions growing out of our system of mining law, which are all comparatively new, as our mining laws are all of recent date and have been very imperfectly considered by the Courts as yet. It is true there are many mining decisions in California and the Pacific States; but they were nearly all made prior to the passage of any mining laws by Congress, and as I shall show in the course of my argument, have really little or no proper application to our present system of mining law. I, therefore, ask a brief and candid hearing on this point, and I think I will be able to change the opinion of this Court, to some extent at least.

I.

This defense sets up that Thomas Starr, the patentee, was an alien and subject of Great Britain, and that he committed willful and corrupt perjury in obtaining said patent, touching his alienage and other facts. It also sets up that he suborned two certain witnesses to commit the crime of perjury in order to obtain said patent, and alleges a combination and conspiracy on his part with Harrison, Myers and other officers of the St. Louis Smelting and Refining Company, defendant in error, and details a state of facts showing that said patent was obtained by fraud, perjury and bribery in their grossest and most aggravated forms—in fact, a successful scheme of wholesale *land piracy* by which the conspirators and pirates secured the legal title to a city worth millions of dollars, and they are now attempting, through the Courts, to consummate this wholesale robbery. All of these *damning* facts are admitted to be true by the demurrer; and are all actually true.

These defendants in error, therefore, stand before this Court, confessing that they are guilty not only of conspiracy and fraud, but of willful and corrupt perjury, sub-

ornation of perjury and bribery, of felonious crimes, and that the patent in question is the *fruit of such fraud and crimes;* but they say, that although such is the case, and that they have robbed plaintiffs in error, or are attempting to rob them of $8,000 or $10,000 worth of property, to which they had a good and valid possessory right—vested right—under the town site laws of Congress and of the State of Colorado, and admit them to be prior rights in every respect, yet they say that these plaintiffs in error cannot assert these rights in Courts of law, and in this form of action, or, in fact, in a Court of equity *even*, or in any *form* of action at law or in equity.

This astonishing doctrine—I ought to say *monstrous* doctrine—is claimed to have been established by this august tribunal in the recent case of the St. Louis Smelting and Refining Co. vs. Thomas Kemp *et al.*, argued before this Court, and decided last spring, Justice Field delivering the opinion of the Court. I participated in the argument of that case myself, and the record presented no questions, except *one or two naked technicalities* in regard to the construction of the mining laws of Congress, which were then argued and determined by this Court; but it is true that there are some *dicta* in the opinion of Justice Field in that case, which, if carried to their logical results, might give color to the astonishing claims made by the defendants in error in this case; but the facts set up in this answer, and admitted by the demurrer, must lead to a careful examination and explanation of that opinion, in so far as the *dicta* is concerned, and, if this Court ventured too far in that case upon the doctrine of the conclusiveness and *sacredness* of a Government patent, and the *infallibility* of the officers of the Land Office, I maintain that that decision should be modified. High as this tribunal is, it has never yet claimed to be *in-*

fallible, or that its decisions, like the laws of the Medes and Persians, are forever unchangeable!

As that decision goes a great length in holding that the actions of the officers of the Land Department in granting mineral and other patents to Government lands are *judicial* and conclusive, beyond the judgments or decrees of any real judicial tribunal ever known to either the laws of England or the United States, or the laws and constitutions of any other kingdom or nation in the civilized world, I shall briefly consider the nature of this remarkable Court—judicial tribunal—the *ministerial* and *political* officers of the Land Office.

II.

To the ordinary legal mind of the country, there are no indications in the mining laws of Congress to show, or even lead a man to suspect that Congress ever intended to establish a judicial tribunal at all, but simply provided for ministerial officers, mere clerks, to carry out those laws. Those officers are not required to be lawyers, but may be mechanics, merchants, doctors, farmers, or worthless politicians and office-seekers, as they usually are. There is absolutely nothing in those laws clothing those officers with the powers and duties of a judicial tribunal, except they examine *ex parte* affidavits, the same as officers of other departments—that of patent rights, and granting of pensions and bounty to soldiers, and the like.

Section 2325, page 428, Revised Statutes, U. S., simply provides that a person authorized to locate a mining claim, may file in the proper Land Office an application, *under oath*, showing a compliance with the law, and within sixty days file a certificate of the United States Surveyor-General that $500 worth of work has been done on the claim; and the applicant must file the affidavits of at least two persons, that the required notice has been duly

posted on the claim; and at the expiration of sixty days, the applicant himself shall file his affidavit that the plat and notices have been posted in a conspicuous place on the claim; and if no adverse claim shall be filed, *it shall be assumed* that the applicant is entitled to a patent. Please examine this section. Here the officers have no *discretion*, they must *assume* on these *ex parte* affidavits, that the applicant is entitled to a patent. There is *no judicial power here*—the granting of the patent is peremptory on the filing of these *ex parte* affidavits and the mere certificate of the Surveyor-General; but if an *adverse* claim is filed, then, the party filing it must, within thirty days thereafter, commence a suit in pursuance of such adverse claim in some Court of competent jurisdiction—either a State or Federal Court—to determine the respective rights of the parties. It will, therefore, be seen that whenever any *judicial* matters are to be investigated, that the mining laws of Congress at once take the whole matter from the Land Officers—clerks—and send all judicial matters to Courts of competent jurisdiction; and this shows that Congress never intended to confer any judicial powers at all upon these ministerial *clerks* of the Land Office; and as a general rule they are utterly incompetent and unfit to exercise judicial powers; and it is a matter of astonishment that this *great* tribunal ever clothed these Land Office clerks with such wonderful judicial powers, and attach a *finality, solemnity* and *sanctity*, to their actions on mere *ex parte affidavits*, that have never, in either England or America, been given to the most solemn judgments of Courts of law or decrees in Courts of chancery. It is a universal rule, to which there is no exception, that even ordinary fraud destroys the most solemn judgments of Courts of law and decrees of the highest Courts of chancery, let alone the gross and aggravated form of fraud which amounts to the *crime* of *perjury, subornation* of per-

jury and *bribery*, as in the case at bar; and the rule is almost as general and universal, that the defense of fraud may be interposed as well in Courts of law as in Courts of equity. I will discuss this point fully hereafter.

Darwin, in his "Descent of Man," goes back a few million years, and finds him nothing but a speck of jelly, sticking to a rock in the bottom of the ocean—not much like a man; but he traces him through a wonderful *evolution*, and follows him, "on his winding way," through fishes, reptiles, birds, beasts and monkeys, until he becomes a perfect man; but this Court went back to the mining laws of Congress, and found some *infinitessimal* elements of *judicial* power in the ministerial clerks and officers of the Land Office—not half as much like a Court as a monkey is like a man—and commenced a *judicial evolution*, and has evolved on, until it has developed, not a perfect Court, but a *judicial monstrosity!* perhaps one of the most remarkable things of the kind the world has ever known, and the worst of it is, that this *wretched* excuse for a Court has been clothed with *absolute* and *final* power over our vast mineral and agricultural domain, worth untold millions.

It might not make so much difference so far as agricultural lands are concerned; but the mining laws of Congress, and the mining laws of the different mining States and Territories, together with the local rules and regulations of such mining district, form one of the most difficult and complicated systems of real estate law ever before known. I venture to say, that no nation in the civilized world has ever before had such a difficult system of laws. The rights that are growing up under our mining laws are perfectly immense, and involve millions of dollars' worth of mining property—I mean, the mere possessory rights, without regard to patents, and to say that our Courts will not, as against fraudulent and wrongfully

obtained patents, protect these vast possessory rights, is another judicial absurdity. These rights must be protected by the Courts, or the miners and settlers on the public domain will protect them with the revolver and shotgun! Congress has thrown open the whole mineral domain of the United States to exploration and purchase, and has wisely provided for town sites and centers of trade and commerce on the same, which are a necessary incident to the exploration and development of our vast mining regions; and our people go by thousands to these rich mining regions and develop mines and build towns and cities on the public domain, under the promises held out by the laws of Congress, that they shall be given good and valid *possessory* rights to their homes and their mines; and the Courts must protect them in these rights, or bring themselves into contempt, and leave the miners and settlers on the mineral domain to protect themselves by force and mob violence, as they have been on the point of doing a number of times in Leadville, against this very patent in the present case, and other patents like it covering the whole city; but they have been assured that the Courts would protect them whenever their case should be fully and fairly laid before them; and they now come to this Court of last resort—the highest tribunal in the land—with their whole case, and appeal for protection against the most outrageous fraud and wrong ever perpetrated on any people. They have built their homes, storehouses, hotels, furnaces, smelters, etc., in good faith, believing they were safe in the possession of their town site, and they now ask protection. If there is a class of men in the world who deserve protection, it is these brave, hardy "toilers of the mountains," who have risked life and health and everything, and endured hardships beyond measure, to secure homes for their families,

in unhealthy, desolate regions and a half civilized country. But I must come back to the *law!*

III.

It has been held by this Court *"that a right to a patent once vested is equivalent, as respects the Government dealing with the public lands, to a patent issued."*

Stark vs. Stans, 6 Wall., 452.

One would suppose that a sounder general proposition could not be laid down in regard to all of the land and town site laws of Congress than the above, by the highest tribunal, speaking through Justice Field in said case, but there seems to be much trouble and confusion in its application.

Under all of our mining laws the miner must first go upon the public domain and locate a claim in accordance with the provisions of said laws, and he must then expend so much money or work in developing the same each and every year, and expend at least $500 in work on such claim in addition to all of the expenses of surveys and the like, before he can obtain a patent; so that he must first acquire a right to a patent by a heavy expenditure of labor or money, and this Court should hold that this right, which entitles him to a patent, should be equivalent to a mining patent; but in the case of the St. Louis Smelting and Refining Company, decided at the last term of this Court, Justice Field makes *dicta* from which it might be inferred that he intended to lay down the sweeping and remarkable doctrine that, although millions of dollars worth of mining and town site property is held under these possessory titles, yet they are not of sufficient importance in law to give the owners thereof a standing in our Courts at all as against any kind of a patent obtained by fraud, perjury, bribery, forgery, or in any other

illegal manner; and that if a man were even to *forge* a patent to a mining property worth a million dollars, held by a possessory title, that such a *forged* instrument would be *conclusive* in a Court of law, and action of ejectment against the real owner, and that such a *forged* patent could not in any manner or any form, be attacked by the real owner of the land to *set it aside*, and that the only remedy in such a case would be to obtain leave, if he could, from the Attorney-General of the United States to commence a suit in equity to set aside such *forged* instrument; and if the Attorney-General or his subordinates should happen to be *bribed* by the *forger*—not an unsupposable case—and the leave to prosecute refused, the owner of the mine would be remediless, as he would not want to proceed to obtain a *resulting trust*, and in fact could not where the instrument was *forged;* but according to the tenor and logic of the decision in the St. Louis Smelting Co.-Kemp case, decided at the last term of this Court, there would absolutely be no remedy at all either at law or in equity, because Justice Field specifically limits the remedy in equity to a *resulting trust;* and what would a resulting trust be worth on a *forged* instrument, or could such a trust be obtained on such an instrument? Courts of Chancery do not do useless and foolish things.

Some years ago a band of counterfeiters in Chicago *forged* patents to large tracts of valuable land in Missouri, and *smoked* them to make them look old, and made them all *regular* on *their faces*, and recorded them; and many lands were sold to third parties and ejectments commenced on those *forged* titles in the Court of that State, and the counterfeits were so perfect that it was almost impossible to detect them; and the evidence was conflicting as to their genuineness; but the Courts of that State allowed the defendants to allege and prove that the pat-

ents were counterfeits; but no such defense could be set up in an action of ejectment in the United States Court under the decision of Justice Field, above referred to.

Now, it seems to me, that whenever a party has a good possessory title to any part of the public domain, under either the mining or town site laws of Congress, and has expended money in improvements or developments, and is entitled to a patent, that the rule that a right to a patent is equivalent to a patent, should apply, and that a party should have the same standing in our Courts as if he had a patent; and it seems to me that the settlers on this town site of Leadville have rights in which they should be protected, and in the defense of which they should be allowed to attack any patent obtained by fraud, perjury, bribery or any *forged* or *counterfeited* patent, or patent obtained in violation of law, in any *form*, either at law or in equity, in the same manner that a deed, or a judgment of a Court or a decree in equity might be attacked. Certainly no greater solemnity or verity should be attached to the acts of the Land Office clerks than to the solemn decrees of a Court of chancery; and yet, if the *dicta* in this St. Louis Smelting Company-Kemp case should be followed to its logical conclusion, it puts the acts—not decisions—of this wretched excuse for a Court—the officers and clerks of the Land Office—above any Court known to the laws and Constitutions of either England or America. A Lord Chancellor in England is not the equal of a clerk in our Land Office—that is, not so infallible! Nonsense!

IV.

But why should this Land Office Court be elevated so far above all other Courts? Suppose Starr, instead of resorting to the crimes of *perjury, bribery* and *subornation* of perjury to obtain this patent, had simply *forged* the patent, and made it all regular on its face, and then commenced

these actions of ejectment, is it possible this Court would hold that these settlers would all have to be thrown out of their homes and places of business, and be compelled to commence a suit in equity and wait until it should drag its slow course through a Court of equity, in order to again recover the possession of their property?

I simply make this illustration to show what seems to me to be the dangerous and absurd lengths to which this doctrine of the *conclusiveness* of patents has been carried, and to show the necessity of *limiting* or qualifying the doctrine.

I can see how the doctrine *originated*, and why it was considered a reasonable doctrine at the time of its origin. So long as the Government was simply selling agricultural lands on easy terms to settlers, and it was not necessary to expend money or make improvements on the land prior to obtaining a patent, it may have been a reasonable and wise doctrine; and before the Government threw open the mineral domain to exploration and purchase, and while it expressly *reserved* all *mineral* lands from sale, which was the case up to July 4, 1866, all miners on the public domain were *trespassers*, in so far as the Government was concerned, and could not acquire any *possessory* rights or any other rights; and, therefore, the miners could not ask the Courts to protect them in rights which they could not legally acquire; but, since the passage of the act of July 4, 1866, throwing open the whole mineral domain to exploration and purchase, and inviting all citzens of the United States, and those who have declared their intention to become citizens, to enter upon the mineral domain and expend so much money in work and improvements on each claim, and authorizing the miner to hold his claim forever without obtaining a patent, on the condition of doing so much work on the same each and every year, it does seem to me that the whole relation of the

miner towards the Government is now changed, and that he has acquired rights from a *paramount source* of title—the mining laws of Congress and laws of Colorado, made in pursuance of the laws of Congress—good and valid rights, which should be as fully protected as if he had a patent.

Now, it seems to me that the confusion and difficulty growing out of these decisions arises from the fact, that this doctrine of the *conclusiveness* of patents, and that a party must claim title from a *paramount source of title* before he can assail a patent at all in either a Court of law or equity, has no proper application to either mining claims or town sites on the public domain. I think the code or statutes of California, from which State this doctrine has largely, if not entirely, sprung, provided, that, in all actions of ejectment of this nature, the Courts should presume the title to the premises in question to be either in the State or Federal Government, and not in the defendant, as in other States; and nearly all of these California decisions to which the other side will refer, were made prior to the passage of any mining laws by Congress, and when all miners were trespassers as to the Government, and, therefore, they have little or no application to the rights of miners on the public domain at present, nor should they have any application to legal town site rights acquired on the public domain. The fact is, that there have been but few decisions made by this Court touching the nature of these *possessory* rights on the mineral domain since the passage of the mining laws of Congress of July 4, 1866, and May 10, 1872, and the efforts to apply the former decisions touching patents for agricultural lands, and touching mining claims on the mineral domain, when the same was wholly reserved from sale by the laws of Congress, has led, and is still leading, to endless confusion and conflict, and to very

great injustice and hardship toward miners and settlers on town sites, and all persons who acquire or claim possessory rights of any kind on the mineral domain; and the fact that decisions like that in the St. Louis Smelting Co.-Kemp case closes the doors of our Courts upon them, and throws so many embarrassments and difficulties in the way of their asserting their *possessory* rights, or defending the same, when interfered with by unprincipled men, and combinations of men, to obtain fraudulent patents by perjury, bribery and other illegal methods; and the case at bar very forcibly illustrates this hardship. In fact, such decisions render all possessory rights on our public mineral domain almost worthless, and leads to so many riots and so much bloodshed in our mining camps, and an entire loss of faith on the part of our miners in the protection of the law, and a contempt for our Courts, and the many outrages and abuses perpetrated by the officers of the Land Office, and the almost universal belief that the officers of that department are corrupt to the last possible degree, and that a man can get a patent for any kind of a claim, and under any circumstances, if he will pay enough for it, have had a very bad effect upon the people in our mining States and Territories.

On account of the bad effect of the decisions of this Court in the St. Louis Smelting Company-Kemp case last spring, and the fact that speculators commenced at once after said decision was published, to locate from 1,000 to 2,000 and as high as 5,000 acres in placer mining claims, and to monopolize and swallow up our whole mineral domain for speculation, the present Secretary of the Interior, on going to Leadville a short time ago, and making a personal examination of the matter, at once issued an order to stop the evil, and when he returned to Washington he openly stated that, in consequence of said decision, he issued the following general order changing

the whole action of the Department in that regard, and limiting the amount of land to be included in placer patents. The order is as follows, to wit:

"DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., September 22, 1882.

"*To Registers and Receivers and Surveyors-General:*

"*Gentlemen*—The following regulations are promulgated as amendatory of circular of October 31, 1881, entitled 'United States Mining Laws and Regulations Thereunder,' and have special reference to applications for patents to placer claims. They are to be considered in connection with paragraphs 53 to 60 of regulations contained in said circular:

"*First*—The first care in recognizing an application for patent upon a placer claim must be exercised in determining the exact classification of the lands. To this end the clearest evidence of which the case is capable should be presented. If the claim be all placer ground that fact must be stated in the application and corroborated by accompanying proofs. If of mixed placers and lodes it should be so set out, with a description of all known lodes situated within the boundaries of the claim. A specific declaration, such as is required by section 2333 Revised Statutes, must be furnished as to each lode intended to be claimed. All other known lodes are, by the silence of the applicant, excluded by law from all claim by him, of whatsoever nature, possessory or otherwise.

"*Second*—Section 2395, Revised Statutes, (subdivision 7), requires the surveyor to 'note in his field-books the true situation of all mines, salt licks, salt springs, and mill seats which come to his knowledge;' also 'all water courses over which the lines he runs may pass.' It fur-

ther requires him to 'note the quality of the lands.' These descriptive notes are required by subdivision 8 to be incorporated in the plat by the Surveyor-General.

"*Third*—If these duties have been performed, the surveys will furnish a reasonable guide to the district officers and to claimants in prosecuting their applications. But experience has shown that great neglect has resulted from inattention to the law in this respect, and the regular plats are of very little value in the matter. It will, therefore, be required in the future that deputy surveyors shall, at the expense of the parties, make full examination of all placer claims and duly note the facts as specified in the law, stating the quality and composition of the soil, the kind and amount of timber and other vegetation, the locus and size of streams, and such other matters as may appear upon the surface of the claims. This examination should include the character and extent of all surface and underground workings, whether placer or lode, for mining purposes.

"*Fourth*—In addition to these data, which the law requires to be shown in all cases, the deputy should report with reference to the proximity of *centers of trade* or residence; also of well known systems of lode deposits or of individual lodes. He should also report as to the use or adaptability of the claim for placer mining; whether water has been brought upon it in sufficient quantity to mine the same, or whether it can be procured for that purpose; and finally, what works or expenditures have been made by the claimant or his grantors for the development of the claim, and their situation and location with respect to the same as applied for.

"*Fifth*—This examination should be reported by the deputy, under oath, to the Surveyor-General, and duly corroborated, and a copy of the same should be furnished

with the application for patent to the claim, constituting a part thereof, and included in the oath of the applicant.

"*Sixth*—In case of a proposed claim for lands not yet surveyed, the foregoing regulations will govern the application for survey.

"*Seventh*—In controversies hereafter to be determined respecting the mineral value of lands, their value for all purposes, whether agricultural or municipal, or as *sites* for *towns*, will be considered without reference to the decisions heretofore made in particular cases. No decision finally executed, however, will be reconsidered under this modification.

"*Eighth*—No application by an association of persons for patent to a placer claim will be allowed to embrace more than one hundred and sixty acres, nor will any application be entertained that embraces more than *one location*.

"*Ninth*—Applications awaiting entry, whether published or not, must be made to conform to these regulations, both with respect to amount of ground and examination as to the character of the land. Entries already made will be suspended for examination by the Commissioner, and such additional proofs as may be deemed necessary in each case will be demanded.

"Very respectfully,

"N. C. McFARLAND,

"*Commissioner.*

"Department of the Interior, Sept. 23, 1882.

"Approved:

"H. M. TELLER,

"*Secretary.*"

It will be observed that the Honorable Secretary has made this order wholly in regard to *placer* mining claims,

and fully recognizes *town sites* and *centers* of trade on *placer* mining ground, and overrules Secretary Schurz's rulings on this point; and I set out the order in full, especially to show that fact, as it has some bearing on the first question, or assignment of error argued in this case.

V.

The Reasons upon which the Decisions I am now Criticising, are Founded.

Necessity is urged as a reason for attaching so much solemnity and sanctity to the decisions or *ex parte* acts of the officers of the Land Office. It is urged that the security and repose of property requires that such sacredness shall be given to the acts of these officers.

With all due respect, it seems to me that this reason is as absurd as the conclusion!

It was urged as an argument last winter in the St. Louis Smelting Company case, above mentioned, that unless this Court should decide in the manner in which it did, that it would unsettle the title to $300,000,000 worth of mining property in all of our mining States and Territories, and principally in California; and this *alleged* fact, whether true or not, had immense weight as an argument of *necessity*. It is said that *hard* cases make hard laws, and it was so in that case; and in order to make that decision, this Court had to *presume—conclusively presume*—a whole *series* of *lies*, for every fact *presumed conclusively* in that case, and upon which that decision was based, was a *lie*, and it is a *sad* reflection on human justice that an august tribunal like this, on account of the great *infirmities* of our laws and judicial system, should *close up* a solemn record of facts that was right before it, and presume that that whole record was a *lie*, and then presume that a whole series of *lies* were truths; and then found an important decision, involving

millions of dollars worth of property, upon "a refuge of lies!" But a moment's reflection will show, that after all, there is not a shadow of *necessity* for any such thing; and this whole doctrine of *necessity* and *repose* of property is nothing but a *specious fallacy*—a *logical fraud*. The laws of all of our States and Territories furnish, and always have furnished, an abundant and suitable remedy to secure the *repose* of property, and to quiet and put forever at rest all contention and strife in regard to such property. These statutory laws are known as the statutes of *limitation*, and our State Legislatures can put the titles to property at rest within any time deemed advisable and necessary for the general welfare.

Our fathers thought twenty-one years short enough time to quiet titles to real estate; but, as this *necessity* has grown greater in our Western States, this time has generally been reduced to five and six years, and, if the necessity has grown so very great in California, where speculators swallow up such vast quantities of the public domain, in violation of both the letter and spirit of the mining laws of Congress, and repose is so much needed to save nearly $300,000,000 of property, I would suggest that the Legislature of that enterprising State should pass a law forever quieting all fraudulent Government patents and those obtained by forgery, perjury, bribery and other like harmless devices, within twenty-four hours from the date of the same, and such a *beneficent* law for *scoundrels* really ought to give sufficient *repose* to property, *even* in California, and relieve this high tribunal from such violent and terrible *presumptions* as this doctrine of supposed *necessity* for *repose* compels it to indulge in. It would also relieve this Court from any further *evolutions* of the extraordinary judicial powers and attributes of the clerks of the Land Office. It seems to me that the pressing necessities of California have already carried these evolutions

too far, and that this whole vicious brood of doctrines of the necessity of presuming lies and giving repose to fraudulent patents, and the closing of the doors of our Courts to persons who have been defrauded out of their possessory titles and robbed of their homes, because they do not deraign title from a common source of title—a patent—although their possessory rights growing out of the mining and town site laws of Congress may be worth millions of dollars; and although they may be robbed of those rights by a confessed perjurer, bribe-giver, and one who admits that he is guilty of subornation of perjury. It seems this whole brood of doctrines have largely grown up and developed under the great necessities of California speculators; and the learned attorneys on the other side of this case, will, no doubt, present to this Court a formidable array of California authorities on all of these points; but this Court is not bound by the authorities of any State when the property in question is not in such State, and only then to a limited extent; but it seems to me that even the California authorities, when carefully examined, do not carry these doctrines to anything like the extent to which they will contend.

In fact, I think there is largely a misapprehension in regard to these doctrines, and especially as to the California authorities, as those decisions were nearly all, if not all, rendered prior to the passage of the mining laws of Congress, certainly all up to about Vol. XXXV of California Reports. In fact, I think California had a special Court—a Board of Commissioners—who passed upon most of the land and, perhaps, mining titles of that State, and from which appeals were allowed to the United States Circuit Court, and that her laws touching this matter were somewhat exceptional, and not at all applicable to our Colorado laws, in so far as our State statutes are con-

cerned; and, therefore, these California decisions should be examined with care.

VI.

What are the Questions which the Officers of the Land Office are authorized to settle or pass upon under the Mining Laws of Congress?

Inasmuch as it is contended this Court has held that all questions of fact upon which it is the *duty* of the officers of the Land Office to pass in granting a patent, are conclusive in actions at law, it is proper that I should carefully examine the mining laws and ascertain, if possible, just what questions of fact said officers are required to determine. I shall take up the questions in the order of the law, and examine them separately.

1. The first question of fact is that of the citizenship or qualification of the locator of a claim or applicant for a patent. Section 2319, the first section of chapter 6, entitled "Mineral Lands and Mining Resources," provides that both the surveyed and unsurveyed mineral lands shall be free and open to exploration and purchase by citizens of the United States, and those who have declared their intention to become such. Section 2321 provides:

"That proof of citizenship under this chapter may consist, in case of an individual, of *his own affidavit* thereof, and in case of an association of persons unincorporated, of the affidavit of their authorized agent, made on his own knowledge or on information and belief."

This is the practice in the Land Office, and consists of nothing but the mere *ex parte* affidavit of the individual, or of the *ex parte* affidavit of the mere agent of an association of persons, and that may be only on *information* and *belief*. This is about as nearly no proof at all as it

possibly can be, and has not the slightest element of a *judicial* procedure; and what frauds upon the mining laws and upon the Government can easily be perpetrated under such a procedure as this, if the same be given all of the solemnity and sanction of a solemn judgment of a Court of law, or a decree of a Court of Chancery? It is understood by our inferior Courts that this supreme tribunal of our nation has actually attached a much greater solemnity to such a wretched procedure as this than the laws of England or America attach to a decree of a Court of Chancery, and in this case at bar, this Court will be compelled to clearly and unmistakably assume and maintain this remarkable position, or to explain and modify some of its former decisions or *dicta*. The case at bar is one of great aggravation, and the facts are all confessed and admitted by the demurrer, and it now remains to be seen to what unlimited extent this Court will go in this matter. With all due respect, it does seem to me it has already *drifted* far beyond all reasonable and safe bounds in this direction. It should also be borne in mind that this question of citizenship goes much deeper than any ordinary question of fraud—it goes to the very root of the whole matter—the right to acquire mining property or mining rights at all on our public mineral domain; but I will discuss this question fully when I reach it in its order.

Section 2325, in regard to how a patent for land claimed and located for mining purposes, provides:

"That any person or association of persons, etc., may obtain a patent, who has or have complied with the terms of said chapter, by filing in the Land Office an application for a patent, *under oath*, showing a compliance with the terms of said chapter," etc.

Here again all that is required is *an ex parte* affidavit

showing in general terms a compliance with the terms of the law, and this is all the proof required by the laws of Congress touching all the material facts required by law in order to obtain a patent. The chapter and section referred to further require that the applicant shall file "an affidavit of at least two persons that the notice required by law has been posted on the claim"—a mere *ex parte* affidavit—and the law says he *shall thereupon be* entitled to a patent, but further provides that the Register shall then publish a notice in a newspaper for sixty days, and that at the expiration of the sixty days the claimant shall file another *ex parte* affidavit showing that the notice and plat have been posted in a conspicuous place on the claim during the period of publication; and the law then provides that if no *adverse* claim has been filed during the sixty days, *it shall be assumed* that the applicant is entitled to a patent.

Here the law is *peremptory* and positive that upon the filing of these *ex parte* affidavits, nearly all of which are in regard to posting notices and the like, the officers of the Land Office *shall assume* that the applicant is entitled to a patent. No *judicial* functions or judgment to exercise here by such officers! In case, however, an *adverse* claim shall be filed during the period of publication, and any *judicial functions* have to be exercised, then the law provides that the whole matter shall be taken from the Land Office and transferred to some Court of competent jurisdiction to be there judicially investigated, tried and determined, and further proceedings in the Land Office are stayed to await the result of such judicial proceedings.

Now, where in the name of reason and common sense, is there the slightest trace of *judicial* power in the Land Office clerks? And upon what reason and authority does this Court clothe them with such wonderful and

dangerous *judicial* powers—almost absolute—over all of our vast agricultural and mineral domain, and over a system of mining law the most difficult and complicated known to our whole system of jurisprudence?

To further demonstrate the absurdity and danger of such doctrine, I will suppose that *these* officers of the Land Department should wholly refuse to issue patents at all to either agricultural or mineral lands or town sites, where would there be any remedy at all against them, if in doing so, they act judicially? Of course, a party entitled to a patent might apply to a higher Court of competent jurisdiction—if, indeed, there is a higher Court in the land—to compel this Land Office Court to act—to put it in motion—in case it should refuse to act at all, to grant or refuse him a patent; but no Court could compel this Land Office Court, acting *judicially*, to grant him a patent! Or suppose the Government itself should be compelled to force it to act, and to dispose of the public lands as directed by the laws of Congress, how could it do so? The fact is, it seems to me, that the *dicta* of Justice Field in the St. Louis Smelting Company case, elevates these clerks of the Land Office above the law, above Congress, and above the Government itself, and clothes them with unlimited and absolute power over our entire public domain; and if the *dicta* of that opinion does not entirely do all this, it so nearly does so, that what mere shadow of right is left to the actual possessors of town site and mining rights on the public domain, under the laws of Congress, is a mere mockery! A mere delusion! It so effectually closes the doors of all the Courts of the land against the owners of these *possessory* rights, which have legitimately grown out of the mining and town site laws of Congress, and amount to millions of dollars, that they are utterly worthless! What are *rights* worth without *remedies?*

To further illustrate the pernicious effect of that decis-

ion: A man at Leadville, after its publication, and seeing that it absolutely broke down all limitation as to the amount of mineral land one man might legally locate as a single consolidated mining claim, used the names of his wife and sons, and friends, and pretended to locate separate 160 acre claims—placer claims—on the *top* of high mountains, and including in all, as one consolidated claim, 3,000 acres—he nominally took quit-claim deeds from his friends for each 160 acre claim, all fictitious, but regular on their face—and really included an entire mineral belt, or all the land he supposed within a very rich mineral belt, and supposed to include hundreds of rich lodes, and simply did $500 worth of work on the whole consolidated claim of 3,000 acres, and applied in due form, and in accordance with that decision, for a placer mining patent to the whole tract, and no legal objection could be urged to his application under that decision.

In order to insure the development of our mineral lands and resources, and to prevent, to some extent, their being located in vast tracts and held for speculation, Congress had wisely provided, that on each and every mining claim $500 worth of work or necessary expenditure should be made to entitle the owner to a patent, and that *one hundred* dollars worth of work or expenditure should be made on each claim each year, to make and keep a *possessory* title good, and that no claim to either an individual or association of individuals should exceed 160 acres of mining ground; but that *decision repealed* this wise and salutary law of Congress, and held that one person might locate one claim, and do the $500 worth of work on it or about it, and then buy up or locate any number of contiguous claims and join them all together, even if they amount to 10,000 acres, or the whole mineral domain of the United States for that matter, and have them all surveyed as *one claim*, and with the expenditure of the $500 in work or

the like, obtain a placer patent for the entire tract; or a man may, as a matter of *fiction*, use the names of eight persons and locate—that is, survey of a thousand claims of 160 acres each, or ten or twenty thousand such claims—and nominally take quit-claim deeds from the nominal parties, and consolidate them all into *one* claim, no matter how much mineral land it may include, and do $500 worth of work on the whole tract—say 20,000 acres—and then obtain a Government patent for this enormous tract of mineral land, and defeat all of the provisions of Congress to prevent such a monopoly. In fact, that decision absolutely defeats and annuls, or I should say, substantially *reveals*, the whole substance and spirit of the mining laws of Congress, and as I shall show presently, substantially *blots out* all *possessory* titles to mines and town site claims on the mineral domain of the United States. I must, now, go on with my present illustration.

This man, who has located and bought up and consolidated his 3,000-acre *claim*, and done his $500 worth of work on the entire track-*claim*, according to that decision, which declares that any number of *locations*—50,000 160-acre *locations* is only *one* claim, and the acts of Congress only requires $500 worth of expenditures on *one* claim—has applied in due form for a *mineral* patent for the same; but Secretary Teller has issued an order, a full copy of which I have set out in this argument, and again refer to, limiting the amount of ground to an *association* of persons *even* to 160 acres, and wholly prohibiting the buying up and consolidation of claims, and stated, in connection with the publication in the papers of his order, that the decision of this Court in the St. Louis Smelting Company case rendered this order necessary, which was, no doubt, true; but now the officers of the Land Department, or the *Land Department Court*, have *overruled* the *decision* of this august and *supposed* Supreme

Court of the United States, and how can this Court help itself?

Suppose this man who has *located* and *consolidated* his 3,000-acre *claim—one* claim—in accordance with the law as construed by this Court, were to apply here for a mandamus, or to any Court of competent jurisdiction, to compel Secretary Teller to grant him a patent; Mr. Teller could simply defy this and all other Courts, by saying that he acts *judicially* and as a Court, in granting or refusing a patent; and that his Court—department—is supreme over the whole public domain of the United States, and has *final* and exclusive jurisdiction of this whole subject; and that the officers of the Land Office are above and independent of all the Courts of the land, and can defy and trample the decisions of the Supreme Court of the United States under their feet; in short, that these clerks of this important department are above and beyond the reach of the Supreme Court of the United States! It really seems to me that this whole subject is getting badly *mixed*, and that this Land Office Court—this *judicial evolution*—can only be properly characterized as a *judicial monstrosity!* It has not the first element of a Court, and yet it is a Court of the most wonderful *powers* and *jurisdiction*, and over the vast mineral and agricultural domain of the United States, and the intricate and difficult system of *land law* touching the same; it seems to be supreme over the Supreme Court of the United States itself, and can defy all the laws of Congress and the rights of all the miners and people upon the public domain; even defy the powers of the Government itself, under present laws as construed by this Court.

VI.

While I am on this point, I wish to consider a little more fully the decision of this Court in the St. Louis

Smelting and Refining Company *case*, which seems to be the "direful spring" of gross injustice, and endless turmoil and confusion and wrong in regard to our *mining* laws, and the important *possessory* rights growing out of the same and out of town site rights on the public domain.

There was only a single question—a *naked technicality* —touching the construction of the mining laws, presented by the record in that case, to wit: Could one man buy up and consolidate a number of placer mining claims into *one* consolidated claim exceeding 160 acres, and then patent the same with *one* notice on the claim, one publication, etc., etc. Now, if this Court had held, that where a number of locations are properly made, and the necessary amount of developing work or expenditure is made on each, and all of the essential requirements of the laws of Congress are complied with touching each claim, and when the consolidation is a mere matter of form, that such claims might be consolidated for convenience and to save expense, such a decision would have been very favorably received by our miners and our Courts; but the reasoning and *dicta* of that opinion wholly swept away all limitations in regard to mining claims, and threw open our whole mineral domain to be swallowed by speculators at almost no cost at all; and absolutely closed the doors of all our Courts to owners of *possessory* mining or town site rights on the public mineral domain as against every species of *fraud* practiced upon and through the Officers of the Land Office by unscrupulous scoundrels.

As the United States Circuit Court for this State and our State Courts understand that opinion, there is no remedy, either in law or equity, in the name of the settlers on the Leadville town site *even* under the allegations of this third defense set up in the answer and admitted

by the demurrer, and which I am now considering, nor would there be even if this patent were an *admitted forgery.*

Justice Field in that opinion, at p. 6, says:

"If the officers of the Land Office, in issuing the patent, took a mistaken view of the law, or drew erroneous conclusions from the evidence, or acted from imperfect views of their duty, or *even* from *corrupt motives*, a Court of *law* can afford no remedy to a party alleging that he is thereby aggrieved. He must resort to a Court of *equity* for relief; *even there, his complaint cannot be heard unless he connect himself with the original source of title, so as to be able to aver that his rights are injuriously affected by the existence of the patent.*"

What is meant here by "*connecting himself with the original source of title,*" is, as our Courts construe it, that he must first obtain a *junior patent* before he can be considered as having connected himself with the *original source of title*, and before he can *even* go into a Court of equity for a remedy; and if the officers of the Land Office, through bribery, corruption or otherwise, refused to grant a second patent for the same land, the party who is injured and robbed of his property—and it may be a mine worth a million, or a whole city, as in this case, worth millions, there is absolutely no remedy at all under this remarkable decision, in either law or equity; and the party obtaining the patent may even be convicted of *perjury* or *forgery* and sent to the penitentiary, yet, under this decision, he would be able to hold all of the fruits of his crime; and this Supreme tribunal of a civilized and enlightened and even a Christian nation would openly proclaim that there is absolutely no remedy in any Court for such wrongs! What a splendid doctrine for *forgers* and *land pirates* on our public domain!

If this is really the true doctrine of that decision, it is certainly on a moral level with that *immortally* infamous doctrine announced in the celebrated Dred Scott decision some years ago from this bench, "that the negro had no rights that a white man was bound to respect." Certainly one such decision as that from the Supreme bench of such a nation as ours ought to be enough for a century at least. It is not safe for our country that such decisions should come too often!

Although the doctrine of this St. Louis Smelting Company decision, or rather the doctrine of Justice Field's *dicta*, shocks both the *reason* and *moral sense* of all our Courts, yet they have been wholly unable to put a different or more favorable construction upon it, notwithstanding I have most earnestly maintained ever since its announcement that a more reasonable and favorable construction should be placed upon it, but our Courts, both Federal and State, say not, and they feel bound to hold, under that decision, that there is no possible remedy either at law or in equity on the ground of bribery, fraud, perjury, forgery or the like, unless the injured party also had a patent from the Government; and it would simply be impossible for the Leadville people to obtain a town site patent from the officers of the Land Office, as they have all along been in the interests of this patentee and other patentees of fraudulent patents obtained to the balance of this city. The city and people of Leadville have employed some of the ablest lawyers in Washington City to try to obtain such a patent, but all efforts have utterly failed.

Justice Field, in that portion of his opinion above quoted, says:

"That if the officers of the Land Office *drew erroneous conclusions from the evidence*, etc., etc., there is no remedy, etc."

Now I have shown above that the officers of the Land Office are not allowed to *draw* conclusions from the *evidence* or to *weigh* the evidence, but the law provides that when certain *ex parte* affidavits are filed, the officers of the Land Office *shall assume* that the applicant is entitled to a patent unless an adverse claim be filed, and then it must go to a Federal or State Court of competent jurisdiction to be tried, and these ministerial officers have nothing to do with such trial.

I wish to especially call the attention of this Court to the fact, that the defendants in the St. Louis Smelting Company case interposed no defense at all that is set up in the present case. It was set up as a defense in that case that said company was a foreign corporation, and could not, under the laws of Colorado, hold such real estate, simply a question of the doctrine of *ultra viries* in that regard; and this defense was wholly abandoned, and there was no defense at all, but the usual *denials* under our Code. It nowhere appeared in the pleadings in that case that there was any *fraud*, or that the ground included in said patent had been first selected and used as a town site, or that Starr was an alien, nor was there a defense of equitable estoppel set up in that case, or any other defense. The Court below, in that case, simply held that the patent was void on its face, because it contained more land than one man was allowed to patent as a single claim under the mining laws of Congress; and this was the only question presented by the record in that case, and the only one properly decided, all the balance of the opinion is mere *dicta;* but, in the present case, I set up all the *facts* touching the obtaining of the patent, and touching the *possessory* rights of the town site claimants, and all the facts alleged are admitted to be true by the demurrer, so that the record in the present case presents many important questions for the decision of this Court.

In fact, it seems to me that the case at bar presents a very remarkable record, and one which must determine some important and interesting questions in regard to our mining laws and mining and town site rights on our public mineral domain.

I am well aware that some of the questions raised by the record in this case have been, either directly or indirectly, passed upon by this Court; but I think a careful examination of the decisions of this Court will show, that, when these questions have been discussed at all, they have only been incidentally touched upon by way of *dicta*, as in the St. Louis Smelting Company case; but I do not consider this last mentioned case as at all conclusive on the questions in the case at bar. Not one of the questions presented by this record was raised or presented by the record in that case. There was no question of *fraud* raised in that case, and no question touching the reservation of town sites on the public mineral domain, and no question of alienage or equitable estoppel; and the question as to the *conclusiveness* of mineral patents was only incidentally presented in that case, if indeed that question was necessarily presented at all. The defendants in error in that case admitted the conclusiveness of patents, with the *usual* exceptions, but simply maintained that that case came within one of the exceptions; therefore, that case cannot be considered as having settled any of the important questions raised in the case at bar, except by way of mere *dicta*.

I also maintain that no such case as the present one has ever before been submitted to this Court, and that this case is, to all intents and purposes, entirely a new case. I also maintain that Mr. Justice Field never intended for a moment that his opinion in that case should be given the construction which our Courts in Colorado have given it. I therefore claim that these questions are

still open for a full and careful consideration by this supreme tribunal of the nation. It is very important to the great and rapidly developing mining interests of our country, and especially of Colorado, that all of these questions touching these vast *possessory* mining and town site rights on our public mineral domain be finally settled in accordance with the principles of reason and justice toward all. All of these important and rapidly increasing possessory rights on our mineral domain should be carefully and wisely guarded and protected by law, and titles of this kind made as secure as possible. It is just as important, if not more so, that security and *repose* be given to property held in this way as to property held under patents. Our mining laws do not require that the owners of mines and mining claims on the mineral domain shall obtain patents for the same; but the mining laws of Congress confer a good and valid title without obtaining patents; and certainly a title conferred by the law itself ought to be as good as a title by a patent which it is merely optional with the party to obtain; and therefore, the rule heretofore discussed, that a right to a patent is equivalent to a patent, should prevail as to all mineral or mining claims, and to all town site rights and pre-emptions, when large expenditures have been made by towns and cities in their corporate capacity, and by *bona fide* settlers upon town sites on our mineral domain. This is only common reason and justice.

. It seems to me that these mining and town site rights on the public domain, are more in the nature of a *Congressional* grant—a peculiar kind of a grant—upon certain terms and conditions; but, nevertheless, a good and valid grant whenever those terms and conditions are complied with. Mr. Justice Field, in his opinion in the case above commented on, at page 5, says, that where lands have been reserved from sale, or *dedicated* to a special purpose—

town site, for instance—or have been previously transferred to others, that a patent for such lands is void, and may be collaterally impeached; and it seems to me that when those lands are transferred to others by the mere operation of the mining and town site laws of Congress themselves, that the owners thereof ought to be in as good condition as if they had actually obtained patents. It is true, that under both the mining and town site laws, patents may be obtained, but there is nothing in mining laws to require a party to obtain a patent at any time, nor does there seem to be anything at all in the town site laws to require a party to obtain a patent; and therefore, it seems to me, to be a great mistake to apply the law in regard to mere agricultural patents, when the whole matter is nothing but a sale and conveyance of the land for so much per acre. The whole system of our mining laws is widely different from that of our laws of Congress in regard to selling agricultural lands, and the sooner our Court recognizes this difference, the better, for they will, in the end, be compelled to do so; and our town site laws are also entirely different from the laws of Congress touching the sale of agricultural lands, and is also somewhat different from our mining laws, as titles and patents may be obtained to town site lots and property in two or three different modes, and it does not seem to be really necessary to obtain a patent in any manner; so that it seems to me perfectly absurd to attempt to apply the law of agricultural patents to those other and different systems of conferring titles to public lands on the mineral domain. It was never intended by Congress that the law of agricultural patents should apply to either mining claims or lands, or to town sites.

An attempt to do so by our Courts only leads to endless confusion and uncertainty, and to ruinous and expensive litigation.

VII.

This brings me to the pure question of the alienage of Thomas Starr, the patentee, in this case. I presume I will be met here, also, with the answer that because the law required Starr to file an *ex parte* affidavit that he was a citizen, upon which the officers of the Land Office were compelled to *assume* that he was a citizen, that that renders the question *res adjudicata*, and conclusive even against his own admissions and confessions that he perjured himself, and was not, in fact, a citizen. It is true, that if this is a question of ordinary *fraud*, and that if no fraud can be interposed to a patent in an action at law, that is the end of it, and all an alien has to do is simply to perjure himself, as Starr admits he did, and obtain a *conclusive* patent to mines, mining claims or Government lands, and enjoy the fruits of his *crime* and defy the Courts and the law.

Now, it seems to me, that this question of citizenship is something more than a question of ordinary *fraud*, and that no *ex parte* affidavit, or any amount of evidence, can render a patent issued to an alien good. The laws of Congress do not authorize the sale of our mineral lands to aliens, who have not declared their intention to become citizens. Our mineral domain is not intended for the subjects of all the governments of the world, nor for those who are willing to perjure themselves to obtain mineral claims on our rich mineral domain; and in so far as *aliens* are concerned, who have not declared their intention to become citizens, our whole mineral domain is still, and no doubt always will be, *reserved* from sale, and the officers of the Land Office have no jurisdiction to sell the same to aliens, no matter how often they may perjure themselves, and all patents issued to aliens are wholly void. Besides,

no alien can acquire a valid possessory right to a mining claim, and therefore, he cannot obtain a valid patent. This is not a question of *fraud*—it is a question of an alien's capacity to take or purchase. There must be two parties, the one to sell and the other to purchase, otherwise no title can pass.

The only case exactly in point, that I have been able to find, is that of Mini's Assignees vs. Adams, 3 Wallace, Jr., page 20.

It was there held: "That a patent obtained by an alien upon an oath, ignorantly or inadvertantly, that he was a citizen of the United States, is *void*, and not *voidable* only."

It is true, this was a patent right for an invention, but the applicant had to make an affidavit before the *Commissioner* that he was a citizen in order to obtain the patent. Mr. Webster was against the patent, and made one of his masterly arguments, and the Court held the patent wholly *void*, and not merely voidable. Justice Grier, of the U. S. Supreme Court, decided the case. I most respectfully urge a careful examination of this case. It should be mentioned that this case was tried and decided in the U. S. Circuit Court for the Third Circuit, and the reference is to 3 Wallace Jr's. Reports.

In that case Mini had, by his own *mental* labor and years of thought and study, mastered a useful invention—had added a useful machine to the industries of the world. It was the result of his own labor and enterprise, but still the Court held the patent wholly void. In the present case, Starr, an alien, who has no right to Government land, attempts by *perjury* to rob American citizens of a whole city, or a large part of a city, worth really millions of dollars, and to rob them of their homes and places of business, built with their own money and by their own labor, hardships and enterprise; and it would be a strange doctrine, indeed, that foreigners, aliens and

subjects of other governments could come to this country, and by making a false *ex parte* affidavit, rob American citizens of a whole city, and out of mines or mining claims, worth millions; and our Courts should say there is no remedy! That if, in the United States, aliens or anybody can obtain any amount of property on the public domain by bribery, perjury, subornation of perjury or forgery, it is *necessary* for the *repose* of *property* that he should not be disturbed in the enjoyment of the fruits of his *crimes!* and that our laws and our Courts afford no remedy! I would here suggest that the remedy through the Attorney-General, in the name of the United States, in these patent cases, is simply a vexation and a mockery; for in the very worst cases, such as these Leadville cases, no leave can possibly be obtained to prosecute in the name of the United States without enormous expenditures. The lamentable fact is, that all such patents are obtained by bribery and corruption; and the Attorney-General always refers applications to prosecute suits to set aside patents to the officers at the Land Office—the very men who issue such patents, knowing all about them—and the result is that in all such cases, when there has been a *huge* swindle perpetrated, the application is sure to be refused, and just in proportion to the extent and enormity of the swindle, is the difficulty of obtaining leave to prosecute! And if these parties who have acquired those mining and town site rights on the public mineral domain, and by a compliance with the laws of Congress, are not allowed to defend such rights in our Courts in their own names, they simply have no remedy.

In the case of the Golden Fleece Co. vs. The Cable Co., 12 Nevada, 312, it was held:

"That an alien who has never declared his intention to become a citizen, is not a qualified locator of mining ground and cannot hold a mining claim either by actual

possession or by location against one who *connects himself* with the Government title *by a compliance with the mining laws.*"

Two important facts are here held: 1. An alien cannot obtain any rights on the mineral domain; and, secondly, a man may *connect himself* with the Government title by a compliance with the *mining laws*—by obtaining a possessory right under the mining laws; and if under the mining laws, then also, under the town site laws; and if this be the true doctrine, then the *dicta* in the case above criticised, or the construction given it, must fall. I also ask a careful examination of this case—

Barney vs. Dolph, 7 Otto, 656.

Examine—

Simmons vs. Wayne, 11 Otto, 262.

The vested right of Starr to his location of a placer-claim did not exist at the date when he made application and procured a survey. All the proceedings were illegal and void. The entry, being based on void application and void publication notice, was also illegal and void—as no legal steps could be taken by Starr to locate and possess the claim or make proof of possession. There had been no compliance with law. His affidavits of possession were false. Even by a subsequent declaration of intention he could not convert his trespass upon the lands into a legal right to the possession, as that a person who had renounced foreign allegiance, any more than it could convert an illegal ballot cast by an alien into a legal ballot, if the voter, pending a contest in the election, declared his intention to become a citizen.

The mining laws did not throw open the mineral wealth of the public lands to aliens, to be claimed, held, and possessed by them as long as they chose to do a cer-

tain amount of work upon the claim each year. Such a construction would put it in the power of aliens to confiscate the mineral wealth of the nation to the exclusion of its citizens, if they made the first entry upon the land. The law did not intend such a wrong.

Where the State statute permitted citizens or those who should become such, to enter State lands upon subscribing the oath of allegiance prior to making the entry, it was held:

"That an entry by one who had not taken such oath was invalid, and not rendered valid by his subsequently taking the oath."

Thompson vs. England, 1 Hawkes, (N. C.) 137.

An alien who has not declared his intention of citizenship was denied the right to settle on public lands, on the ground that "he had no more right to make said entry than any other subject of England."

Case of McDevitt, Land Office Report, 1877, p. 93.

A patent obtained by an alien in violation of law was held invalid and not cured by subsequent naturalization.

Opinion of Grier, J., in Mini's Assignee vs. Adams, 3 Wall. Jr., pp. 29, 30.

A case exactly in point is—

Boyce vs. Danz, 29 Mich., 150.

No retroactive effect is given to a declaration of intention to become a citizen.

Ettenheimer vs. Heffernan, 66 Barb., 376.

In Heney vs. Brooklyn Benevolent Society, 39 N. Y., 335, it is stated that the retroactive effect of naturaliza-

tion in England is due to special provisions in acts of Parliament. The New York Court held:

"* * * It would be most logical and most consistent with sound principle to say that the subject, when naturalized, began to have capacities pertaining to citizenship available for the future, and only in such future. If it were conceded that the Congress of the United States have power to declare the effect of naturalization so as to give to the subject thereof all the rights retroactively, as well as prospectively, which he would have had if native born, of which, in respect to real estate within the State, the transfer, transmission and descent of which is peculiarly matter of State policy, there is great room for doubt. I think it clear that the naturalization laws of the United States admit of no such construction.

"Under those laws the applicant is admitted to citizenship upon complying with certain prescribed conditions. He becomes a citizen. He is put in a condition, or acquires a character, in which he can have and enjoy all the rights and privileges which, by law, pertain to citizenship, and that is all. But all this is, according to the plain reading of the laws, prospective. His capacity then begins to be useful or efficient to enable him to have and enjoy whatever pertains to his new character."

Also see—

White vs. White, 2 Met., (Ky.,) 189.

The case of Osterman vs. Baldwin, 6 Wall., 122, is not in point.

Under the laws of Texas an American citizen was an alien and could not hold real estate there. Baldwin bought of the Galveston City Company certain land. After the admission of Texas a party claiming adversely defended on the ground that Baldwin, being an alien at

the time of the purchase, never took title. The Supreme Court of the United States applied the rule "that an alien may take by deed and hold against the sovereign until office found." The deed being from a citizen, is good against citizens, but not against the sovereign. Texas did not escheat the land prior to annexation. The legal title was in a citizen of Texas, and the equitable in Baldwin until annexation, which made Texans American citizens. It did not make Baldwin a citizen of Texas, but made his grantors American citizens. The right of escheat was not enforced by the Republic of Texas. The resolution of annexation reserved to the State of Texas its wild and unappropriated lands, but did not reserve any right of forfeiture against American citizens. The State of Texas had the right to escheat the lands of aliens to the United States, but not of citizens, as its power in this respect was no greater than that of other States. The Court say in the opinion: "When Texas was admitted into the Union the alienage of Baldwin was determined." It would have been more correct had they said "the alienage of Texas was determined." Her right of forfeiture was determined because citizens of the United States had equal rights with Texans in Texas, and could enforce every right there which could be enforced by citizens of Texas. The sovereignty of Texas as a nation was determined, and the prohibition to the acquirement of land by American citizens fell with it. Besides, Baldwin did not perjure himself and attempt to reap the fruits of his own crime or wrong.

The citizenship of Baldwin was not changed, and the statement that naturalization has a retroactive effect was *obiter dicta*, and erroneous.

The joint resolution admitting Texas, and the first section of the act of December 29, 1845, 9 Stat., 1, put Texas

on the footing of other States, and extended all the laws of the United States over Texas. See—

Catlin vs. Cocke, 14 How., 235.

This Court has passed upon the question of alienage in the case of Hall vs. Russell, 11 Otto, 510, 511, where it was held that the grant was not to a "settler," but to a "qualified settler." "Whenever a settler qualified himself to become a grantee, he took the grant, and his right to a transfer of the legal title from the United States became vested. But, until he was qualified to take, there was no actual grant of the soil."

Donations were confined to citizens, and no alien could obtain a patent until naturalization; and the Court held:

"An alien who had declared his intention to become a citizen, or who should do so before December 1, 1850, was a qualified settler, but he was not a qualified grantee until he had completed his naturalization."

"His rights in the land were statutory only, and cannot be extended beyond the just interpretation of the language Congress has used to make known its will."

Ibid, p. 512.

As Mr. Starr had no legal possession of the land in controversy, and could have none, he could do no act in compliance with the law.

These decisions show that the register had no jurisdiction of the application of Starr for a patent, and that the proceedings, being in violation of law, were absolutely void.

"What the law says shall not be done shall not vest a title or receive any aid when it is done."

Bank of the United States vs. Norvell, 2 A. K. Mar., 105.

"A transaction originally unlawful cannot be made any better by being ratified."

United States vs. Grossmayer, 9 Wall., 75.

IX.

Fraud as a Defense.

In ejectment, certificates of entry, and a patent based on fraud, can be inquired into, and are not conclusive upon the Court.

State of Minnesota vs. Bachelder, 1 Wall., 115.

The doctrine that an alien's declaring his intention to become a citizen may relate back does not apply in this case, for several reasons—first, Starr committed perjury, and cannot reap the benefit of his own crime; and second, he is still an admitted alien on the record.

The extent to which a Court of law will go in order to impeach a patent is said to be well stated in the case of Cooper vs. Roberts, 6 McLean, 93, where it was held, that *fraud* may be shown in procuring a patent *at law*, as the execution of a deed, being executed *fraudulently*, may be avoided at law; but in neither case can the fraud be alleged and proved *at law*, except in the issuing of the patent, or of the other, in the execution of the instrument.

This is just the kind of fraud we set up as a defense to this patent—fraud in issuing the patent.

It will certainly not be contended that the officers of the Land Office passed upon the question of *fraud* and *perjury*, and subornation of perjury and bribery, on the part of Starr, when they issued the patent. It is wholly collateral and outside of that inquiry.

Courts of law and Courts of equity have concurrent jurisdiction in all cases of *fraud*, except where fraud is *presumed*—when it is merely constructive—equity has ex-

clusive jurisdiction; but in all cases where *fraud* must be alleged and proved—where it is actual—both Courts have equal jurisdiction.

White vs. Jones, 4 Call., 253.

And it is held specifically in this case, that a Court of law may avoid a patent for fraud.

In the case of the Lessee of Swaye *et al.* vs. Robert Burke *et al.*, 2 Peters, 11, this Court, through Justice McLean, says:

"That fraud is cognizable in a Court of law, as well as in a Court of equity, is a well established principle. It has been often so ruled in this Court."

It is a general rule, "That whatever is done in *fraud of law* is done in *violation of law.*"

Lee vs. Lee, 8 Peters, 50.
King vs. Wheat, 4 Cow., 71.

The case of Johnson vs. Towsley, 13 Wallace, 72-92, is a leading case on the doctrine of the conclusiveness of Government patents in Courts of law.

This case was in regard to agricultural land in the State of Nebraska, and the conflicting rights seem to have accrued, or began to accrue, as far back as March, 1858, and involved the acts of Congress touching the sale of agricultural lands as far back as September 4, 1841, and act of 1858.

Now, the act of 1858, in express terms, makes the decision of the Commissioner of the General Land Office *final*, unless an appeal be taken to the Secretary of the Interior, and, of course, when an appeal is taken, the decision on appeal must be *final.*

I wish to say here, as an answer to all decisions of this Court and all other Courts, in regard to patents for agricultural lands under the different acts of Congress for the

sale and disposition of agricultural lands, that all of these acts touching the agricultural domain are so widely different in their provisions, and the whole nature and substance of these laws of Congress, from Chap. VI, p. 426, of Revised Statutes, in regard to the sale and disposition of mineral lands, that the decisions of this and other Courts in regard to the construction of the agricultural acts can have no possible reasonable application to the mining laws of Congress, or to *mineral* patents issued under the same, or to the town site laws of Congress. A careful examination of these respective acts will show the absurdity of attempting to construe them all the same in any material regard.

I am discussing a placer *mineral* patent and town site rights in this case, and the mining and town site laws of Congress, and not agricultural patents, and the agricultural laws of Congress, which are entirely different, and have no connection with each other.

I shall only point out a few of the differences: First, the act of 1858 expressly provides, that the decisions of the officers of the Land Office shall be final; it gives them complete and *final* jurisdiction over the subject matter; and provides no other Court for the adjudication of such questions; whereas the mining laws provide, that the applicant shall file his *ex parte* affidavit as to compliance with the law and the *ex parte* affidavit of at least two witnesses as to posting notice, etc.; and that the Land Officers shall then *assume* that he is entitled to a patent, unless an adverse claim be filed, in which case the whole matter in dispute shall be sent to some competent Court, either State or Federal, to be tried. It will also be observed that there is no provision at all under these mining laws for appeals to any Court or officer of the Land Department.

These mining laws contemplate that all judicial ques-

tions shall be settled on adverse claims in Courts of competent jurisdiction, in the usual manner, and that the actions of the officers of the Land Office, in regard to issuing *mineral* patents, are wholly *ministerial*, and not in any manner judicial. The whole judicial part of the procedure is turned over to proper Courts to be determined, in the usual form of actions, with the right of appeals and writs of error, the same as in all other cases. It will also be noticed that this difference in procedure grows out of the great and substantial difference in the rights of the parties. In regard to agricultural lands, it is simply a sale or a gift to the applicant; but, as to mineral land, large expenditures must be made, in the first place, to secure developments, and a patent is only granted at all on condition of certain developments, and an expenditure of a certain amount of money; and then the laws of Congress do not require a locator or purchaser of a mining claim to obtain a patent at all; his title is good without doing so, and it is merely optional with him to do so; and I therefore maintain that the officers of the Land Office only act *ministerially* in issuing *mineral* patents; and that such patents are not *conclusive* in Courts of law as against the possessory rights of others, either possessory, mining or town site rights. The only questions which are *conclusive* and *res adjudicata* in a *mineral* patent are such as have been passed upon by Courts of competent jurisdiction in cases where adverse claims have been filed and the questions in dispute properly tried and determined by a Court. It is true there are certain claims which must be filed in the local Land Office within the sixty days of publication, or they are thereafter *barred;* but this only shows that Congress intended that all *judicial* questions should be settled in this manner, and that there was no occasion for any appeal in these mining cases, and that, in regard to every other

matter, the officers of the Land Office act ministerially. Please examine Secs. 2325 and 2326 in regard to adverse claims.

The attorneys on the other side may answer, that inasmuch as the city and people of Leadville filed no adverse claim, they are *barred* under the laws of Congress; but I reply that town sites are reserved from sale, and that all sales of the same are void, and all proceedings to obtain a patent for the same are void; and that the law does not require parties to adverse void proceedings; and secondly, that adverse claims only include such mining claims as the party adversing may obtain a mineral patent for, when the action is decided, in case he should be held to be the owner of the premises in dispute. An examination of this section, 2326, will show at once, that it does not include a town site claim; and, therefore, a town site claim is not *barred* under the statute for failure to adverse, nor is there any thing in the town site requiring an adverse, or any thing working a forfeiture of town site rights for non-compliance with the terms of the law, and no limitations cutting out or barring town site rights.

Again, the rule of the Land Department, which I set out in full in my pleadings, reserving all town site rights upon the surface, and all surface improvements in all these *mineral* patents, is notice to all town site claimants by the Department itself that town site claimants need not file adverse claims; and it was in the omission of this exception, which we allege was obtained by fraud and perjury by Starr and his co-conspirators, from this Starr patent, that the great wrong and fraud was perpetrated in this case; and certainly this question was not *judicially* determined by the officers of the Land Office in regard to this exception, so as to be conclusive. Put in this important *exception*, and we have no objection to the patent.

It seems to me that, as it is a general rule of the Land

Department that this *exception* should be inserted in all of these *mineral* patents, that it should be considered as a part of the same. Certainly the officers of the Land Office have no right to publish such an order that all town site rights on the surface will be excepted from mineral patents, and then fail and refuse to do so, as in this case, and afterwards say that the town site claimants are forever barred because they did not adverse. As no one has, as yet, ever contended that town site claimants are barred unless they adverse, I shall not pursue this question further. I simply wished to guard the Court upon this point.

In the Johnson-Towsley case, above referred to, which is a leading case on the doctrine of the conclusiveness of agricultural patents, Mr. Justice Miller delivers the opinion, and I ask its careful consideration, to show how different the *law* and *facts* of the present case is from that.

At page 24 Justice Miller says: "In dealing with the public domain—even agricultural domain—under the system of laws enacted for their management and sale, that tribunal decides on private rights of great value, and very often, from the nature of its functions, this is by a proceeding essentially *ex parte*, and peculiarly liable to the influence of *fraud*, *false swearing* and *mistakes*."

If this be so touching agricultural patents, how much more so touching *mineral* patents; and, therefore, the great danger of clothing these officers with almost absolute and unlimited power over our immense mineral domain, where the temptation to fraud, bribery and perjury, are certainly a hundred times greater—I think I might say a thousand times greater—and the case at bar illustrates this fact.

I therefore, with great confidence, submit this whole matter to this high and final tribunal for a careful and wise review of this entire doctrine, and its application to

our mining and town site laws on the public mineral domain, although I have but very imperfectly pointed out the great difference between our mining and town site laws and those voluminous laws of Congress touching the pre-emption, homesteading and selling of our agricultural domain.

The case of Gibson vs. Chouteau, 13 Wallace, 92, and Sampson vs. Smily, 13 Wallace, 91, and all such cases, have no application to our mining and town site laws, and Mr. Justice Miller, who delivered most of the opinions in these cases, carefully examined their application to mineral patents, touching their conclusiveness, on the trial of the celebrated Iron Mine case in Denver in 1879. The following is an exact copy of the opinion on that trial:

"*Ruling of Hon. S. F. Miller, Associate Justice of the United States Supreme Court, upon the question of What a Mining Patent Grants, given during the trial of the Iron Mine suit.*

"At the hour of adjournment Mr. Macon had propounded to the witness a question, whether, in his opinion, the sheet or body of ore which is found in this region where the plaintiffs' mine is situated was such a body of mineral matter as constituted a vein or lode, or whether it was more analogous to placer mines. That question was objected to by plaintiffs' counsel, the objection being on the ground, that the patent from the United States to the plaintiffs concluded that question, because it was a patent for a vein, with the right to follow it in all the incidents which attached to it, and that, therefore, the decision of that question by the land officer who issued the patent was one which, if not entirely conclusive, could not at least be questioned in an action at law. It has been decided, and the main one was delivered by myself, in the Supreme Court of the United States, and which

was the opinion of the whole Court, and which has since been re-affirmed, with this modification, that, where the Department of the Interior—the Secretary of the Interior —has failed to act in reference to swamp lands in any way, it was then a question open to a jury whether it was swamp land or not, and it was held that the certificate of the Secretary of the Interior to a railroad company, whose grant was two years later than the swamp land act, did not preclude the State from asserting and proving in an action at law that it was swamp land. I think the latter case, which I cannot recall now, is much more in point than the former case. I delivered both opinions. In the latter case, it was the duty of the Secretary to certify to certain railroads the alternate sections of land within five miles of their road when that railroad was laid down and platted on the map as the fixed line of road, filed in the office of the Commissioner of the Land Office. It might just as well be argued, that, when the Secretary issued a certificate to that railroad for the land, it was conclusive that he had conclusively stated that it was not swamp land, as it can be argued here when a patent has issued for a mine in certain boundaries, which, the patent says, gives him a right to the vein or metal, that it is a vein of metal. It is only inferential in either way that can be, that the Government, or its officers, have acted upon the question, either that it was swamp land or that it was a mineral vein. The decision first made and first ruled on rested on an entirely distinct grant of the act of Congress. Nothing appears in the State Department, nor any rules established; nothing appears in the Department of the Interior, nor any rules established and permitted by the Commissioner of the Land Office for the Government of the Register and Receiver, but that the act of Congress had made it the duty, not the privilege, of the Secretary of the Interior to ascertain and certify to

the States in which they lie, these swamp lands. The title passed by the statute. We have held that it was a grant *in presenti*, that the title dated from the date of the statute, and the law made it the duty of the Secretary to say what were swamp lands and what passed, by the statute, to the States. When he did that, when, by any act of his which implied necessarily that his attention had been called to the subject, and he had decided that the piece of land was swamp land, that the title related back to the date of the grant, and could not be impeached in a Court of law. Whatever inquiries might be made in a Court of Chancery, let the general principles of the Chancery Court govern on the subject. Now, when a thing is found in the statute, and there is no provision, no express provision certainly, that the Register, Receiver, Commissioner of the Land Office, nor the Secretary of the Interior shall, before issuing a patent, so ascertain that a vein exists—and, for obvious reasons, these officers are wholly incompetent, or, if not wholly incompetent, as little competent as anybody else in the world to determine whether a vein does exist or not. There is but a single emergency in the statute which would seem in any way to require them to ascertain that fact, and that is, that they are to have $5 an acre for the surface ground, which is supposed to include a mineral vein; that, again, they are to have $2.50 per acre for surface ground which may include placer deposits; and they are to have $1.25 per acre for land which includes no mineral whatever. Now, if a man goes and claims a location of $2.50 per acre, where the Register and Receiver of the Land Office may be of the opinion there may be contained a vein, it is probable, it is possible—I do not say whether he can or not—that he would make such inquiries as might induce him to refuse to sell that land at $2.50 per acre, because he is entitled to $5 an acre; but, as I understand the

statute, after a careful consideration of it, and as I understand my Brother Hallett has gone over it after it was read to us, that he called the attention of the counsel to that fact. I know of no right or authority for the Register or Receiver to refuse to take $5 an acre for any land in this country, whether it has got a mineral vein or not, provided nobody else disputes the claim, and there is no contest of the man's right to enter the land. As I understand that statute, any citizen of the United States may go out here in the open prairie, fifty or a hundred miles east of this where there never was supposed to be a vein of mineral, nothing but sand and sage brush, and say if he chooses, 'I have found a vein of ore; have staked off 300 feet one way by 1,500 feet the other way; I have made the excavation which the law requires; I have posted the plain sign or notice which the law requires, and I have done everything necessary, and nobody contests my claim, and I tender you $5 an acre for that ground, and I demand a patent.' I know of no right of the Commissioner first to make any inquiries whether there is a vein there or not, and I think it is the duty of the Land Office to issue him a patent for the vein that he says is there. Now, if I am correct in that, it is impossible that the law makes it the duty of the officers, when about to issue a patent, to ascertain that it is a placer, and make a determination upon that subject, for these reasons and others.

"Judge Hallett is of the opinion, further, that, even were not that true, that the patent may be valid for the superficial area within the lines perpendicularly drawn; but that the patent, even then, even if it was the duty of the Land Office to ascertain whether it was a vein, it was not their duty to ascertain whether that vein extended outside of their lines to the ground outside of these side lines of the described premises, the Iron Mine. I think he is correct in that also; so that, any view we can take

of it, we think the question is open here, whether at the place where the contest takes place, where this contest has commenced, whether it is a vein there or whether it is not a vein within the meaning of the statute. Of course, that overrules the objection to the question, so far as it relates to the irrelevancy of the testimony."

I simply refer to the above opinion to show that Justice Miller, who wrote the strongest leading opinions in regard to the conclusiveness of agricultural and swamp land patents, and Judge Hallett, recognized a great difference between those patents and a mineral patent in this regard; and I think when carefully examined and compared, it will be found that the essential differences in the mining and agricultural and swamp land laws are so great in this respect, that the decisions touching the latter can have but little or no application to the former.

The latter clause of Sec. 2325, p. 428, in regard to the issuance of mineral patents, provides: "That in case no adverse claim be filed, that thereafter—after all the proofs are in—no objection from third parties to the issuance of the patent shall be heard, *except it be shown that the applicant has failed to comply with the terms of this chapter.*"

This exception of the statute itself seems to be broad enough to keep any question heard by the officers of the Land Office from being conclusive, and must apply after a patent has been issued, because the same section provides, in a line or two above that upon the filing of the *ex parte* affidavits mentioned, if no adverse claim be filed, the officers *shall assume* that the applicant is entitled to a patent; and this cuts off all further evidence prior to the issuing of the patent, and expressly leaves open all questions touching a compliance with the terms of the chapter after the patent has been issued. This is the only reasonable construction that can possibly be given to that important section; and for this reason alone, I maintain

that a mineral patent, when there has been no adverse and no judicial trial, is open for any one to show that the patentee has not fully complied with the terms of that chapter—in other words, that when there is no adverse and the matter has not been referred to a Court of competent jurisdiction, the officers act wholly in a *ministerial* capacity, and that the acts of these officers are not judicial or conclusive.

It is true, that in Sec. 2335, p. 431, the law provides for a contest before the officers of the local Land Office, as to whether or not the land is of a mineral or agricultural character—not as to whether a lode or vein has been discovered on it—there need not be lodes or veins on placer ground—but as to the general character of the land; but this is simply an incidental provision as to where and in what manner the proofs may be taken, and on what notice—it says as provided in that chapter, and the only provision in that chapter for any proof of anything is by *ex parte* affidavits.

This is simply a provision to determine conflicting claims between *pre-emptors* of lands on the mineral domain for agricultural purposes, and those who claim the same land for mining purposes. Section 2341, p. 432, of mining chapter, provides that where lands *designated* as mineral lands, have been settled and used for agricultural purposes, and are of no value for mining purposes, that they may be patented by such pre-emptors as agricultural land, and on this question the land officers may hear proof—*ex parte* affidavits; and this is the only purpose for which the officers of the Land Office are empowered to hear such proofs, which are *ex parte* affidavits as to the general mineral or agricultural character of the land; and upon this question their decision may possibly be *judicial* and conclusive; but this has no application at all to the case at bar.

This whole chapter must be taken together and construed together, and without regard to the laws of Congress touching agricultural and swamp lands, which have no connection at all with this chapter, throwing open our mineral domain to exploration and purchase; and the officers of the Land Office only possess such powers in this respect as this chapter confers upon them. The laws of Congress in regard to agricultural and swamp lands were passed many years prior to any of our mining laws, and when our mineral lands were all reserved from sale, and were passed by Congress to apply exclusively to agricultural and swamp lands, and without any regard whatever to mineral lands, and were never intended to apply in the remotest manner to our mineral lands or mineral patents. It may be maintained that the general law establishing the Land Department and the office of Commissioner of the General Land Office, and the general powers conferred on such Commissioner, apply to our mineral lands; but when we turn to this Chapter 3, and Sec. 453, p. 76, we find this provision:

"The Commissioner, etc., shall perform, under the direction of the Secretary of the Interior, all *executive* duties appertaining to the surveying and sale of the public lands of the United States, or in any wise respecting such public lands; and also, such as relate to private claims of land; and the issuing of patents for all grants of land under the authority of the Government."

It will here be seen that the Commissioner's duties are all *executive*—none *judicial* at all, and unless the laws of Congress as to the sale of public lands confer judicial power, the Land Commissioner possesses none at all by virtue of his office—he is purely an *executive* officer, and performs only *executive* duties. It seems to me that it is

vain to search anywhere for judicial powers in the officers of the Land Office in regard to issuing mineral patents. This may be wise or unwise, nevertheless it is so.

III.

Equitable Estoppel.

The Court below erred in sustaining the demurrer to the fourth defense set up in the third amended answer.

This assignment of error presents the doctrine of *equitable estoppel* as a defense in actions of ejectment in the United States Courts; and this whole field has been covered, and this doctrine finally settled by this Court in the case of Dickerson vs. Colgrave, 100 U. S., 578, and in the case of Kirk vs. Hamilton, 102 U. S., 68.

These are both well considered and elaborate cases, and settle the doctrine that in the U. S. Courts equitable estoppels may be interposed as defenses in actions of ejectment; and the only question that can arise in the present case is, as to whether or not the facts alleged in this defense, and admitted by the demurrer, constitute a good equitable estoppel; and a mere glance at this part of the answer will show, in a moment, that the strongest possible state of facts is alleged. Fraud, in some manner, is the basis of equitable estoppel; and I set out the most aggravated state of facts, showing both actual and implied fraud, and even a deliberately formed conspiracy to secrete the claims of the defendant in error and its co-conspirators, to the land included in the Leadville town site, and subsequently in this patent; and to deceive and mislead the plaintiffs in error and other settlers on said town site, and to induce them to expend their money in making valuable improvements, and in building up said city, and increasing the value of all vacant lots, as well as those they actually improved, and ask a careful examination of the

facts alleged in this defense; and I have set out this defense, as well as the whole answer, in full in this brief and argument, so as to make it convenient for this Court to examine the facts alleged in all of the defenses. See page of this argument for this defense.

I am aware that there is a great deal of refinement and nice learning in the books in regard to the doctrine of estoppel, and some kinds of estoppels are said to be odious; but this can not be said of equitable estoppel. This is both a growing and a beneficent doctrine, and it seems to me if there ever was a case in which it should be applied in full force it is to the facts in the case at bar, for they certainly appeal with peculiar force to both the reason and conscience of the Court. It seldom if ever happens, in the course of human transactions, that such a state of facts is presented to any Court in any form of action.

It will be seen that there are three separate grounds of estoppel really set up in this defense.

1. That the defendant in error, by its officers and its grantors, stood by for a number of years, and saw from day to day the people rapidly settling upon the town site of Leadville, and saw both the city itself and the settlers, including the plaintiffs in error, expending tens of thousands of dollars in building up a large and flourishing city, without giving them any notice whatever of their secret claims to the town site as placer mining claims; but on the contrary, fraudulently and intentionally suppressed and secreted the same, with the intention of defrauding plaintiffs in error, and other settlers, out of their improvements and possessory rights to their lots.

2. That after it was found out that they applied for a patent to the same, that they intentionally and fraudulently caused it to be made known and circulated through the said city, that in case they should obtain a patent, that the settlers would not be disturbed in their rights—

lots and improvements—but if anything at all should ever be expected or claimed of the settlers, it would only be a nominal sum, not to exceed $25 per lot, to help pay the actual expenses of obtaining such patent. That these reports were falsely and fraudulently circulated to lull the plaintiffs in error and other settlers to sleep, and prevent an exposure of their fraud in the Land Office, and that such rumors had that effect, etc.

3. That the defendant in error, and its co-conspirators also, secretly and through fraud, perjury and bribery—specifying the facts showing the same—induced the officers of the Land Office to leave the town site exception out of this patent, with the intention of defrauding plaintiffs in error and other settlers out of their lots and improvements. That they intentionally secreted this fact until after they had obtained the patent, and did everything they could to deceive and mislead the people and put them off their guard, and to induce them to go on expending their money in making valuable improvements, and that they did so in good faith, thinking they had good possessory titles up to the time of the publication of notice for said patent, and, after that, relying upon the false and fraudulent assurances of the officers of defendants in error, its co-conspirators; and also relying, as the town site claimants had a right to rely, on the general rule of the Land Department, requiring a town site *exception* in all mineral patents of this kind. It will be seen, by an examination of this town site *exception*, which is fully set out at p. — of answer, that it would have fully protected the settlers in all of their town site rights, and they could depend on it, and had a right to do so, and, therefore, went on making their improvements and build ing up a city, never dreaming for a moment that their rights were in danger; and these conspirators stood by day by day, and not only secreted their fraudulent inten-

tions, but did, and caused to be done, everything they possibly could to deceive and mislead the plaintiffs in error and all other settlers, and to lull them to sleep, and induce them to go on expending money and building up a city, simply to be robbed of the same.

I must ask the Court to examine this defense carefully, in connection with the authorities above referred to; as it seems to us, no stronger case of equitable estoppel could possibly be alleged; and these authorities so fully and completely settle this doctrine in this Court, that it is not deemed necessary to refer to others.

2. I presume it will be contended on the other side that this mineral patent is so sacred and conclusive, that even an equitable estoppel cannot be set up as a defense against it; but that *wretched* doctrine must fail them here; and I congratulate myself, that I have at last, got rid of what seemed to me to be both a pernicious and an absurd doctrine, without either reason or justice, or even necessity to sustain it in many of its most objectionable features, although, to a reasonable extent, and wisely applied, it may be a *salutary* doctrine as to agricultural lands and patents.

I also congratulate myself that I have now reached a point where I am within the domain of reason and justice, in so far as the decisions of this Court are concerned, and done with the actions of the officers of the Land Department, and the *inexorable* and *conclusive* presumption of *lies* in the face of solemn record facts, and where the spirit of wisdom and justice and *truth* pervades the law.

As this doctrine of equitable estoppel does not attack or touch the immaculate *legal idol* set up by this Court, or disturb the sanctity and solemnity of a mineral patent obtained by confessed perjury, subornation of perjury, bribery, conspiracy and fraud, the other side have now to meet me where the law, founded on reason and justice,

prevails; and it is a sad thing for them and their miserable patent when they are compelled to meet their opponents on such grounds.

As I shall not, and need not, lay my hands on their *sacred* instrument in discussing this assignment of error, they cannot interpose the objection that I am attacking a Government patent in a Court of law.

This doctrine simply says, that no matter whether their patent be void or voidable, good or bad, they shall not, under the circumstances, set it up as against plaintiffs in error. That they fraudulently kept quiet when they should have spoken; and now their mouths are stopped forever, no matter whether their patent was conceived in fraud and perjury and subornation of perjury, and brought forth in corruption and iniquity, or whether it be an honest instrument, honestly obtained, so far as the Government is concerned, and the balance of the world; yet it cannot be interposed against plaintiffs in error and others in the same condition. Therefore, we do not attack the patent, nor attempt to impeach its validity in this defense, and we get entirely rid of all the peculiar doctrines of the conclusiveness of Government patents, and slough off the whole brood of questionable doctrines growing out of the same.

In the case of the City of Cincinnati vs. Lessee of White, 6 Peters, 431, an equitable estoppel was interposed as a defense in an action of ejectment against a Government patent, and sustained by this Court, and cited with approval in the case of Dickerson vs. Colgrove, 100 U. S., 582. It has also been held by this Court, in Stoddard vs. Chambers, 2 How., 284, that an action of ejectment may be maintained on a title by equitable estoppel, so that this doctrine is now well settled by this Court, and cannot be shaken. Besides, it is still a growing doctrine in all

Courts of our land, and one well founded in reason and justice.

3. It possibly may be urged that the facts alleged in the latter part of this defense show a binding contract between the settlers on the town site and the patentee and his co-conspirators; but I submit that the facts there alleged do not constitute a binding contract. No definite amount to be paid by the settlers was agreed upon, and the plaintiffs in error had no fixed or specific contract with the defendant in error or with its co-conspirator, Thomas Starr, the patentee; and the answer simply alleges, that, after the publication of notice, the plaintiff company—defendant in error—by its officers and through its attorney, A. P. Hereford, assured plaintiffs in error and other settlers on said town site, that, in case a patent should be obtained, they would not be disturbed in their possession or improvements, and advised plaintiffs in error and other settlers to go on expending their money and making their improvements; and that, relying on these reports and assurances, they did so; but that said reports and assurances were intentionally false, and made to deceive and mislead plaintiffs in error and other settlers, and for the purpose of inducing them to go on and expend their money in making their improvements and building up said city, so that said conspirators might defraud them out of the same. That said defendant in error and co-conspirators intentionally avoided making definite and binding contracts, with the intention of repudiating their assurances entirely, and defrauding plaintiffs in error and other settlers, etc. I ask a careful examination of this part of the answer.

I have also set out in full the statutes of Colorado, making all of these *possessory* rights and titles *real estate*, and clothing them with every attribute of real estate under our laws, and all sales and transfers of the same

must be made in the same manner as other real estate; and, therefore, no mere verbal agreement touching the sale or transfer of the same would be binding, and, as no purchase money was paid or possession given under the assurances, the plaintiffs in error could not compel a specific performance of any such assurances.

Sec. 8, p. 477, General Laws of Colorado, provides:

"That every contract for the leasing for a longer period than one year, or for the sale of any lands, or any interest in lands, shall be void, unless the contract, or some note or memorandum thereof expressing the consideration, be in writing, and be subscribed by the party by whom the lease or sale is made."

But while the assurances made by the officers of defendant in error and their co-conspirators did not amount to binding contracts, they do constitute a strong case of equitable estoppel.

4. It may be urged that the equitable estoppel in this case can only apply to the improvements, and not to the lots or ground. I cannot see why it should not, on general principles, apply to the lots and ground as well. A part of the settlers pre-empted their lots, and others purchased their lots from those who did pre-empt them; but why should not the doctrine of equitable estoppel apply to a pre-emption or possessory title as well as to one purchased? I can see no possible difference, and no distinction of this kind was made in the case of the City of Cincinnati vs. White's Lessee, 6 Peters, 431, above referred to. These parties in the present case stood fraudulently by and saw these settlers select and occupy their lots as a part of the town site of Leadville in good faith, or purchase the same in good faith from those who had pre-empted them, and then go on and expend their money and make their improvements in good faith, and inten-

tionally and fraudulently secreted their pretended claims to the same as placer mining ground, until large sums of money had been expended and a flourishing young city built, and until property became very valuable, and then they attempt a wholesale robbery of these people.

The following general principle is laid down in 2 Wharton's Pennsylvania Digest, p. 789, to wit:

"There is no principle better settled, nor one founded on more solid considerations of equity and public utility, than that which declares, that if one knowingly, though he does it passively by looking on, suffers another to purchase and spend money on land, under an erroneous impression of title, without making known his title or claim, he shall not afterwards be permitted to exercise his *legal* rights against such person."

Carr vs. Wallace, 7 W., 100.
McKelvey vs. Truby, 4 W. & S., 323.
Miller vs. Cresson, 5 W. & S., 302.

"A party having title to land taken possession of by a city, under an act of the Legislature, to make valuable improvements on the same, and who neglects to set up such title, cannot afterwards contest the validity of the act vesting such land in the city."

Pittsburg vs. Scott, 1 Raw., 309.

"A party who encourages another to settle on land and improve it, and expend his money and labor upon it, will be estopped from setting up an older and better title to such land, although this encouragement was given in ignorance."

McKelvey vs. Truby, 4 W. & S., 323.

"One who knowingly and silently permits another to expend money on land, under a mistaken impression

that he has title, will not be permitted to set up his right."

Godefroy vs. Caldwell, 2 Cal., 489.
Park vs. Kilhan, 8 Cal., 77.
Ryan vs. Ranirely, 8 Cal., 461.

"The wrongdoer is estopped, on the principle, that he shall not take advantage of his own wrong."

McCracken vs. San Francisco, 16 Cal., 591.

"Equitable estoppels are founded on the theory, that, to permit a man to maintain the right which he asserts, wouldo perate as a legal fraud upon his adversary."

Farish vs. Coon, 40 Cal., 558.
Davis vs. Davis, 26 Cal., 23.

"The same rules of law relating to estoppel *in pais* apply to mining ground as to any other real estate claimed under a similar kind of title."

Kelley vs. Taylor, 23 Cal., 11.
McGee vs. Stone, 9 Cal., 600.

It must be borne in mind that these decisions were made prior to any laws of Congress for the exploration and sale of our mineral lands, and when all occupants were trespassers, so far as the Government was concerned; and when the Courts simply recognized possessory rights as among the miners themselves; and if the doctrine of equitable estoppel applied to such imperfect possessory rights, how much more so to legal and valid possessory rights under the laws of Congress.

I refer to those authorities, and make this suggestion, because it was seriously argued in the Court below that equitable estoppels did not apply to possessory rights on the public domain, such as mining and town site rights. It seems to me, that if there is a place in the world where

equitable estoppels should apply, it is to possessory mining and town site rights on the public domain; but these authorities settle that question.

It has been held in California, that, when a party stands by and permits another to *settle* on lands, he is estopped; that when the case proceeds on the ground of fraud and culpable silence, they are questions of fact for a jury.

Grum vs. Bates, 6 Cal., 263.

When one stands by and sees another pre-empt town lots on the public domain or locate a mining claim, and expend money on the same, the doctrine of equitable estoppel applies the same as when one stands by and sees another purchase land and expend money on the same without giving notice of his claim.

Justice Miller so applied the doctrine in the case of Crossman *et al.* vs. Pendery *et al.*, tried in the United States Circuit Court at Denver a few terms ago, on an agreed statement of facts, and it is so applied in all of the mining States and Territories where the question has come up. I should not mention such questions, if they had not been insisted on in the Court below in the case at bar, and they may be raised and insisted on in this Court.

The counsel for defendant in error may also insist that, inasmuch as the mineral patent was issued after all these grounds of estoppel accrued, that they cannot apply to an after-acquired title; and there may be some force in the doctrine where the grounds of estoppel apply to one distinct title, and the party afterwards purchases another and entirely different title; but in the case at bar, the defendant in error and its co-conspirators, claim to have owned all of the placer mining claims included in said patent since about August, 1877, and some of them since

the fall of 1860; and the patent was only the consummation of these possessory titles—in fact, a party must have a good title to a mining claim before he can obtain a patent. The patent is only evidence of title, and it requires a combination of both a possessory title and a patent to constitute a perfect fee simple title, and as a matter of *fiction* the patent relates back to the inception of the claim and date of location. I only mention this question because some stress was put upon it by the Circuit Judge in the Court below; but it was only incidentally mentioned. No question can arise in this case as to the fact that defendant in error, and its co-conspirators, fully understood their own claims and possessory titles, such as they were, and fully understood what they were doing, and all of the facts and circumstances surrounding the matter; and that plaintiffs in error and other settlers were wholly ignorant of the pretended possessory claims of Starr and others during several years, when the city was building most rapidly; and it is alleged and admitted by the demurrer that no mining was ever done on the ground, and that it was of no value for mineral; and that it was never in the possession of the patentee and this Smelting Company, whose officers conspired with said Starr; and that no notice was upon any part of this ground to indicate that it was claimed as placer mining ground or otherwise; but that it was possessed, used and occupied as a town site, and had been so actually possessed and used as a town site ever since the spring of 1860; and that both the city and the settlers understood it was a town site, and had no means of information to the contrary up until about the time or after the publication, when it was found out for the first time that it was claimed as placer ground; and then it was that the patentee and his co-conspirators, the officers of defendant in error, deceived the settlers by their false and

fraudulent reports and assurances, as alleged in the answer. But I here wish to impress upon the minds of the Court the fact, and I regard it as an important and controling allegation, that no notice was given in any manner by the conspirators that the town site *exception* was to be left out of this mineral patent; and that it was in regard to this exception, which would have saved all of the town site rights to their fullest extent, that the grossest fraud and deception, and the perjury, bribery and subornation of perjury, were largely practiced; and that no mining notices or publications, or certificates of location or records, if there had been any, would or could have disclosed this important fact; and it was the perjury of Starr himself, and bribery and subornation of perjury, and the assistance of the officers of the defendant in error, and their co-operation and unlawful conspiracy, which misled and imposed upon the officers of the Land Office, and induced them to issue this patent with this important exception left out, when all of the other usual *exceptions* (five in all, I believe), were put into this patent; so that neither the city of Leadville, nor the settlers, had any possible means of obtaining any knowledge of this fact before the issuance of the patent itself; and, therefore, no question as to constructive record notice, had there been any, or means of knowledge by use of due diligence, could possibly come up in this case, if, indeed, they could in any case of equitable estoppel.

Even when records of title exist and are shown to exist, and afford constructive notice of title, yet there is no case in the books, where such fact has been held, to defeat any equitable estoppel when actual fraud is alleged and shown. In certain cases, where there has been nothing but innocent silence, without any fraudulent acts or intention, and it has been shown that there was a record title, it has been held by the Courts to defeat a mild case of pure silence; but such cases have no application at all to the case at bar.

The answer alleges that the patent notice was intentionally published in a weekly paper, and that no one but a skilled surveyor could tell from this notice where said land was located, except that it was somewhere in the county of Lake, and State of Colorado, and that it was intentionally so published so as to deceive and mislead the people of Leadville; and these allegations are admitted by the demurrer.

I might here explain that this land was not within the U. S. surveys, and that mining claims were designated by being *tied* by bearings to distant mountain peaks, and Government monuments erected on the same, and being usually from six to ten and even twenty miles away, so that it required a very skillful surveyor to find and identify one of these claims from the description given in a patent notice published in a newspaper; and we allege and it is admitted, that the description in this case was made as difficult as possible, and published in a weekly paper, which had no circulation in the town.

"Where a boundary line is fixed by parol agreement between A and B, adjoining owners, and B afterwards, with the knowledge of A, makes valuable improvements, relying on such settlement, without any objection or remonstrance or notice of dissent from A in regard to the line thus established, the latter is estopped from claiming that the same was not the true boundary."

Corkhill vs. Sanders, 44 Barb., 218.

"A defense of equitable estoppel may be set up in ejectment, and the same doctrine applies to both real and personal property."

Corkhill vs. Sanders, 44 Barb., 218, 219.

As to doctrine generally and the rapid growth of the same, see—

Piper vs. Gilmore, Vol. 3, N. S., American Register, 284 to 591.
Cummings, Admr., vs. Webster, 43 Maine, 192.
Wallis vs. Truesdell, 6 Pick., 455.
Welland Canal Co. vs. Hathway, 8 Wend., 430.
Rangely vs. Spinney, 21 Maine, 130.

The case referred to above in 44 Barb. shows more of a contract a great deal than the case at bar, yet it was held to be an estoppel.

As we allege facts showing actual fraud and conspiracy, none of the nice questions discussed in some of the books as to what amount or degree of fraud or gross negligence which would amount to a fraud must enter into an equitable estoppel, as we allege facts showing perjury, bribery, fraud, subornation of perjury and conspiracy, we are far beyond all debatable grounds on this question; and we are certainly beyond all debatable grounds on all questions pertaining to equitable estoppels and their interposition as defenses in actions of ejectment; and of all remedies known to either law or equity this seems to be the shortest and best in these Leadville ejectment suits, and one that meets all the requirements of speedy justice, except the defense that this land was reserved from sale.

As there are hundreds of these cases, I might say thousands, it would require the commencement of a great multiplicity of suits in equity to declare resulting trusts, and be attended with immense expense and great delay, and the Commissioner of the Land Office, to whom the Attorney-General referred our applications to prosecute suits in the name of the United States, to set aside this and other like patents, has refused to grant such permission, as might have been expected in these cases, and from the actions of these officers throughout this whole Leadville matter; and now this wholesale land *piracy*, and robbing

of these people of a city, built by their own money, labor and enterprise, will be consummated and sustained by our Courts, unless some, at least, of these defenses set up in this action are sustained by this Court, and the judgment of the Court below reversed. A large number of similar case in the Court below and in our State Courts are awaiting the final decision in this case. All the others hang on the fate of this case in this Court. Is it possible that so great a wrong can be perpetrated in this land of *law* and *justice*, and there be no speedy, effectual and adequate remedy? For the first time in the history of our jurisprudence, is this Supreme Court of our nation going to declare that the people of a whole city can be robbed of their homes and property through bribery, conspiracy, fraud, perjury and subornation of perjury on the part of an alien, and our law and our Courts afford no adequate and effectual remedy? Can this great tribunal afford to so declare? Why should it so declare? There is no other kind of property or rights in this country that cry so loudly for the stern protection of our Courts as these already vast and rapidly growing *possessory* mining and town site rights on our public mineral domain! No other property or property rights in this country, or any other country, so much exposed to fraud and wrong as these *possessory* rights on our mineral domain from their position, and the very nature of these rights themselves, and their immense real and speculative value, and the excitement that attends the settlements of our great mining camps. If the *necessity* really be great for protecting agricultural patents, and mineral patents as well, from attacks in our Courts, how much greater the necessity of protecting these *possessory* rights from fraudulent and wrongfully obtained mineral patents, a danger to which they are especially exposed from their very nature, and the great and tempting opportunities on the part of sharp, unscru-

pulous men to perpetrate frauds of this kind. As between patents and these possessory rights, all the weight of reason, justice and *necessity* is on the side of protecting these important and greatly exposed possessory rights on our mineral domain. Nothing else can so much hasten the development of our great mineral resources as a stern protection of all these mining and town site rights on our mineral domain.

Millions more of capital would flow into the State of Colorado alone for the purpose of exploring and developing our mines and mining resources, were it not for the sad fact that our Courts are affording no protection at all to these great rights; but, on the contrary, seem to be doing everything within their power by giving the most forced and unfavorable construction possible to the laws of Congress made for their protection; and the decision and *dicta* of this Court in the St. Louis Smelting Company case last spring gave the legal death blow to all of these rights, and absolutely outlawed them, and turned them over as a booty to conspirators, bribe-givers, perjurers and unprincipled scoundrels. That decision offers a great *bonus* to *land pirates*, city and mine robbers, forgers of mining patents, and every species of fraud, perjury and crime connected with mining patents, and secures the criminals *even* in the fruits of their own *wrongs* and *crimes*. Such, I mean, is the direct and logical result of the doctrine and *dicta* of that decision; and, if this Court allows it to stand, without modification or change, as the final law of the land, it will soon breed such a swarm of mineral patent *forgers*, and of perjurers and characters of that ilk, as this country has never before known, and it will certainly arrest and turn back the development of our mining resources for years, and until Congress can change the law, which will require time.

In discussing the doctrine of equitable estoppels, in

the case of Dickerson vs. Colgrove, 100 U. S., 580, Justice Swayne says:

"The estoppel here relied on is known as an equitable estoppel, or estoppel *in pais*. The law upon the subject is well settled. The vital principle is, that he who, by his language or conduct, leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both. This remedy is always so applied as to promote the ends of justice. It is available only for protection, and can not be used as a weapon of assault. It accomplishes that which ought to be done between man and man, and is not permitted to go beyond this limit. It is akin to the principle involved in the limitation of actions, and does its work of justice and repose where the statutes can not be invoked."

At page 582, he says: "But it is said this objection to the plaintiff's claim is not available in a court of law, and must be set up in equity." This is certainly not the common law. He here refers to Littleton and Lord Coke, to show that an equitable estoppel may be set up in an action at law, and then refers to the case of the city of Cincinnati vs. Lessee of White, 6 Peters, 431, and says:

"The proprietors of the city plat, dedicated the ground between Front street and the Ohio River to the public, for commercial purposes. The *legal* title—the patent—had not then emanated from the Government. White, long subsequently, acquired the legal title—a patent—and brought ejectment for the premises," etc., and goes on and reviews that whole case, which is exactly in point in the present case, and this Court re-affirms the doctrine of that

case, and holds that an equitable estoppel can be set up as a defense in an action of ejectment.

In that case, as in the one at bar, the facts constituting the estoppel occurred before a patent was obtained, and the ejectment was commenced after the patent was obtained, the same as in the case at bar; but the facts in the case at bar are a thousand times stronger than the facts of that case. There was no fraud, perjury, bribery, or conspiracy alleged and admitted in that case, and no town site exception had been fraudulently left out of that patent; and no such aggravated state of facts as alleged in the case at bar.

In the case of Kirk vs. Hamilton, 102 U. S., 68, decided as late as 1880, Justice Harlan delivers the opinion, and reviews all of the authorities, and in a thorough and masterly manner sums up the whole doctrine; and this Court there again re-affirms this whole doctrine, and settles it so firmly that it can never be questioned or disturbed again; for it is both a wise and benificent doctrine, and reaches the ends of justice by the shortest possible route.

Justice Harlan says, at page 78:

"This question, in a different form, was examined in the case of Dickerson vs. Colgrove, 100 U. S., 578. That was an action of ejectment, and the defense based on an equitable estoppel, was adjudged to be sufficient. We there held that the action involved both the right of possession, and the right of property; and that, as the facts developed showed that the plaintiff was not in equity and conscience entitled to disturb the possession of the defendants, and there was no reason why the latter might not, under the circumstances disclosed, rely upon the doctrine of equitable estoppel to protect their possession."

He also says, at same page:

"The doctrine of equitable estoppel is, as its name indicates, chiefly, if not wholly, derived from Courts of equity, and, as these Courts apply it to any species of property, there would seem no reason why its application should be restricted in Courts of law. *Protection against fraud* is equally necessary, whatever may be the interest at stake, and there is nothing in the nature of real estate to exclude those wise and salutary principles, which are now adopted without scruple in both jurisdictions in case of personalty. And whatever may be the wisdom of the change through which the law has encroached on the jurisdiction of Chancery, it has now gone too far to be confined within any limits *short of the whole field of jurisprudence.* This view is maintained by the main current of decision."

The common law has been enlarged and enriched under the principles and maxims of equity, which are constantly applied at the present day in this country, and even in England, for the relief of grantees, the protection of mortgagees and the benefit of purchasers, by a wise adaptation of ancient forms to the more liberal spirit of modern times."

The above is logic and wisdom worthy this great tribunal and the progressive spirit of the age; but how different this doctrine from that of the St. Louis Smelting Company case, in which this Court close up a solemn record of facts, and presume them all false, and *conclusively* presume a whole *series of lies*, and, upon those *lies*, render a decision involving millions of dollars' worth of property; and Justice Field still goes on, and makes a *series* of *dicta*, that absolutely obliterate all law and all remedies for the protection of the vast possessory rights on our mineral domain, and actually outlaws all such rights, and also, on his *presumption of lies*, invites land *pirates* and robbers, *forgers* and perjurers to rob our people of *even*

cities with impunity, and holds out to them absolute security in their plunder and the fruits of their own *wrongs* and *crimes*, and closes the doors of our Courts against all who are robbed of such possessory rights, no matter whether mining rights or mines worth millions, or a whole city of from 16,000 to 20,000 people, like Leadville.

This may seem a dark picture, nevertheless it is the construction and effect which our U. S. Circuit Court, and all our State Courts give that decision; and the sustaining of the demurrer to the answer in this case, with all the *damning* array of facts admitted to be true, and which, as a matter of history in this State, are absolutely true, shows how our U. S. Circuit Court understood and interpreted that decision.

I now ask why the wise and progressive doctrine laid down by Justice Harlan, in the case just referred to and quoted from, should not be applied to all mineral patents in other forms as well as in the form of equitable estoppel. An estoppel of this nature is but one form of fraud, and if it is wise to interpose fraud in the form of equitable estoppel in such cases, why would it not be wise to interpose fraud in any form to a mineral patent the same as in case of an ordinary deed, when such patent has been wrongfully obtained in *fraud* of *prior* possessory rights, growing out of the mining and town site laws of Congress, and allow the parties actually defrauded, to set up such defense in law as well as in equity? What interest has this Court in covering up and protecting *fraud?* If a mineral patent has been obtained in fraud of valuable possessory rights, should this Court shield the perpetrator of the *fraud?* Why should this Court so construe the law as to make it a shield and protection to fraud, perjury, forgery and the like? Ought not any mineral patent, obtained in this manner, to be overthrown, in the easiest,

most expeditious manner possible? All patents fairly and honestly obtained, have nothing to fear from our Courts or any other source. There is no foundation for the argument that patents *honestly* obtained are in danger. It is only the fraudulent patents that would be in danger, and the more danger they are in the better, and the quicker they are gotten rid of the better.

The law abhors *fraud* and *spews* every instrument tainted with it out of its mouth; and why should it not *spew* out a mineral patent obtained by bribery, perjury, conspiracy and the grosser and more dangerous and odious forms of fraud, out of its mouth? No instrument reeking in fraud—confessed fraud, conspiracy and crime like the one in question in this case, should stand for a moment in any Court! Who ever heard of an honest patent being declared void by any Court? What has truth and justice and honesty to fear from Courts? Then why not throw the doors of all of our Courts, both law and equity, wide open for the detection of fraud, and the overthrow of all fraudulent transactions and instruments, and for the maintenance and protection of honestly and legally acquired property and property rights, and extend this protection to all of the valuable rights acquired, under the laws of Congress, on our vast mineral domain as well as to other parts of our country? Why should not our brave, hardy, toiling miners be protected in their mines and their homes in our mountains, as well as citizens of other parts of this great country?

Fiat justitia, ruat celum.

T. A. GREEN,
Attorney for Plaintiffs in Error.

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IN THE

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SARAH RAY, JOHN STEELE, JOHN MILL, *et al.*,
Plaintiffs in Error,
vs.
THE ST. LOUIS SMELTING AND REFINING CO.,
Defendant in Error.

Error to the Circuit Court of the United States for the District of Colorado, sitting at Denver.

REPLY TO ARGUMENT FOR DEFENDANT IN ERROR.

T. A. GREEN,
Of Counsel for Plaintiffs in Error.

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The attempted criticism on my opening argument is not well taken. It is true, it is not in the usual style of mere points, suggestions and a citation of authorities, for the reason that such an argument could not possibly meet the case. The mining laws of Congress are of comparative recent date, and no decisions of this Court covering a general construction of those laws have ever been made; but it is insisted by the counsel on the other side that all of the decisions of this Court touching agricultural and

swamp land patents shall be applied to mineral patents. These laws are very voluminous, and contain an endless number of provisions as to the duties of Land Officers in regard to finding certain facts, and providing for appeals to the Land Commissioner and the Secretary of the Interior, etc., and that certain findings shall be final and conclusive, etc., none of which provisions have any application at all to the chapter of mining laws; but these mining laws contain different provisions entirely in many respects, as I have pointed out and shown in my opening argument, but I was compelled to do so by a process of reasoning and analytical comparison of the provisions of the two different systems of laws.

It is charged that I indulge in severe reflections on this august Court; and it may be that I do seemingly reflect on the *dicta* of Justice Field in the St. Louis Smelting Co. case; but while I always entertain the most profound respect for Courts and Judges of Courts, I still deem it my right and privilege to criticise what I may deem bad reasoning or pernicious doctrine, no matter from what source it may emanate, whenever such reasoning and doctrine may come in my way, when I am in the line of my duty as an attorney.

I certainly have not intentionally reflected upon this high tribunal, but have done all in my power to show that neither Justice Field in his *dicta* in the case just mentioned, or this Court in any of its decisions in regard to land patents, ever intended that any such construction should be given to either *dicta* or decisions as to render them a shelter and protection to fraud, perjury, bribery, and to all kinds of public land piracy and pirates on our vast public mineral domain. It is the counsel on the other side, who, by their *monstrous* doctrines, and perversions of the decisions of this final tribunal, reflect on this Court. To insist that any high tribunal, of any civilized country, intention-

ally announces doctrines that manifestly operate as a shield to fraud, perjury and crime, and as a gross wrong and injustice upon honest people, is, in my judgment, a sad reflection upon such tribunal.

So far as this whole case is concerned, the other side come into this Court admitting that they obtained this patent for over 164 acres of a city worth millions, by conspiracy, fraud, bribery, perjury and subornation of perjury; that they obtained land from the government for $2.50 per acre that was worth to the government, under the town site laws of Congress, from $500 to $10,000 per acre, and intentionally deceive, mislead and defraud the people of a fine city out of all their property—possessory rights and improvements—amounting to millions; but they say that notwithstanding an alien and subject of England has done all this, yet under the decisions of the Supreme Court of the United States, there is no remedy, either in law or equity, in the name of this people, for the great wrong which they confess. That is, no direct and adequate remedy in any form; and if there is any possible remedy known to the law at all, it is mere mockery! It has always been the glory and boast of our land, that there is no wrong without a suitable remedy; but in the present case the counsel on the other side have maintained, and the Court below has held, that this Court of final resort has changed all of that doctrine in regard to the whole mineral and agricultural domain of the United States, and established the doctrine that if any man—alien or citizen—can by fraud, perjury, bribery, forgery, or in any manner, obtain millions of dollars worth of property on the public domain, that the law affords no remedy—adequate remedy; and that he may come into our Courts and openly confess it all, and that our Courts will say to him, you can safely enjoy all the fruits of your fraud and crime, as the law affords your victims no remedy. It was

formerly not so; but this Court has so changed the law, that it now shelters and protects such scoundrels as you are, and aids and abets and encourages you in your robberies on the public mineral domain!

This is the doctrine for which the counsel on the other side contend, and I now leave the matter for this Court to determine, in so far as the general aspect of the case is concerned.

I shall only briefly notice the *old* and *familiar* points, which have been repeated again and again by counsel in all of these cases.

I.

They urge the same absurd doctrine of the absolute conclusiveness of *mineral* patents in regard to everything, which I have fully anticipated in my opening argument.

It is not true, as stated on page three of their argument, that there are only twenty-four cases depending on this test case. Harrison Avenue runs through the center of the city of Leadville, north and south, and eighty per cent. of all property east of it is now held under *possessory* titles, and over one-half per cent. of all property on the west side is still held under similar titles, and all of the north or new part of the city is held under the Cooper and Searl patents, and involves the same questions at issue in this case. The Stevens and Leiter patent, covering 298 acres, and the Starr patent 164 acres, and Searl patent 107 acres, and Cooper patent 62 acres, are all involved in this litigation and all depend upon the decision in this case, which, if decided in favor of the patents, will be followed, at once, by the commencement of not less than 2,000 new suits, and not less than 10,000 people will be turned out of their homes and places of business, and be robbed and ruined financially, as under the laws of Colorado, in force at the time Leadville was built, they can

recover nothing for their improvements even. If these patents are sustained by this Court in the present case, and none of the defenses set up allowed, it will simply be the absolute robbery of a city *legalized*.

II.

It is urged against the town site defense, that the answer nowhere asserts facts showing a town site under the laws of Congress. I submit that every possible fact necessary to such a town site is alleged, and also facts showing a good and valid town site under the laws of Colorado. I think it was held that a warehouse and four or five small dwellings constituted a town site in the Portland, Oregon, case. The whole territory need not be covered with houses. Besides, the reservation extends to land *selected* as a town site, and to land reserved and occupied for *trade* and *business*, and we allege all of the facts necessary to bring this land within all of these *reservations*, and the demurrer admits these facts, and admits that the land was reserved from sale, and this ends this matter. Even if the land was *mineral*, still the reservation is good, and to talk about the laws of Congress making a distinction between lode claims and placer claims is simple nonsense.

It is only a very small portion of the ground in any mining region that is of any actual value for mineral—certainly not one-half—not even one-tenth as a general rule. There is always plenty of room for cities, towns, mills, smelters and all kinds of business.

I venture to say, that there is not in the whole State of Colorado to-day, one hundred acres of ground actually known to be valuable for *placer* mining purposes. Our valuable mineral is all found in lodes and in carbonate deposits or beds, deep under the earth, or in our mountains. So far as Colorado is concerned, this whole placer

business is largely a fiction, and a fraud upon the mining laws of Congress and upon our people and miners.

The other side quotes largely from Justice Miller's opinion in the cases of Johnson *vs.* Towsley, 13 Wall., 72; French *vs.* Fegan, 93 U. S., 169; Shepley *vs.* Cowen, 91 U. S., 340; Moore *vs.* Robbins, same, 96; and many other authorities, to show the conclusiveness of *mineral* patents, and especially as to the fact that ground ~~unclaimed~~ included therein is *mineral* land.

Justice Miller reviewed all of those opinions, written by himself in the Iron-mine cases at Denver some time ago, and I set out his opinion in that case in full in my opening argument to show that he did not think a mineral patent conclusive as to the character of the land, or the fact that mineral has been discovered on the same, and held, that under the mining laws of Congress, it was not the duty of the officers of the Land Department to pass upon that question, and as a general rule they were wholly unfit to do so, and that a mineral patent was not conclusive as to that matter.

I may here state that the whole misapprehension arises in these cases touching mineral patents, from the attempt to confound mineral patents with agricultural patents, when the laws under which mineral patents are issued are wholly different in all essential matters from the laws under which agricultural patents are issued. The chapter on mining laws must be taken by itself and construed by itself—it has no connection whatever with the chapters touching agricultural patents.

III.

It is objected that we are barred from setting up this town site reservation as a defense, because we did not adverse. I have fully anticipated this objection in my opening argument, and shown that it is not an adverse

claim within the meaning of the laws of Congress; and besides, that our great complaint is the fraudulent manner in which the land officers were induced to leave the town site *exception* out of this patent. This is a very important matter, but I have fully discussed it in my opening argument, and simply mention it. The able counsel on the other side utterly fail to answer either the facts alleged or my arguments on this point—in fact, they cannot be answered.

The St. Louis Smelting Company case is referred to and greatly relied upon by the other side. I think the learned gentlemen claim entirely too much for that case, and that the doctrine and *dicta* there laid down, when fully explained by this Court, and applied to the facts of the present case, will be a different doctrine from what they maintain.

They say this is the same case, because Mrs. Ray is also a party here. It is true, this is the same patent that was attacked in that case, or rather ~~these~~ two cases, for two cases were argued together; but we do not here raise the same question that was decided at the last term of this Court. We gracefully submit to the only question that was raised by the record in that case; but we do object to the construction given by the Court below and by the counsel on the other side to the mere *dicta* of that case.

The only question raised by the pleadings and record in ~~these~~ two cases, and the only question argued before this Court, was as to whether the patent was void on its face, because it contained too much land. It nowhere appeared, even in the pleadings, that there was a town site on the ground, or that Starr was an alien, or that he obtained the patent by fraud and perjury, or that there was any ground for an equitable estoppel. Not one of the three special defenses set up and relied on in this case appeared in any manner in those cases; and I maintain

that no such case as the present one can be found in any of the books; and I further maintain that all of the cases referred to touching the *conclusiveness* of agricultural patents have little or no application to *mineral* patents, and that all of the California and other decisions made in regard to mining rights on the public domain prior to July 2, 1866, the date of the first mining law passed by Congress, have no application whatever to mining rights acquired under the mining laws of Congress, and there was no law for the location and sale of placer mining ground until May 10, 1872; and the effort to apply decisions touching *possessory* rights on our mineral domain, when it was all reserved from sale, and the miners were really trespassers, so far as the Government was concerned, to *possessory* rights acquired under the mining laws of Congress, is a wonderful absurdity. When it was simply impossible for any one to acquire a *possessory* right on the mineral domain as against the Government, it was both reasonable and natural that our Courts should hold that no *impossible* right should be set up in our Courts against a Government patent; for how could any one be defrauded out of rights which it was impossible fer him to acquire, and, therefore, patents were conclusive; but when the Government threw open its vast mineral domain to exploration and purchase, and, by virtue of its mining laws alone, and without requiring parties to obtain patents at all, *even* within a thousand years, unless they wished to do so; but pledging miners good titles and protection in their rights, without patents, on condition they would invest their capital and devote their energies and enterprise to the development of our great mineral resources, the whole relation of the miner to the Government was at once changed, and a miner could acquire good and valid rights on our public mineral domain without obtaining a patent, out of which he can be

defrauded by the issuance of a wrongful and fraudulent patent, and individual rights may be acquired lying far back of patents, and which may be wrongfully effected by the issuance of fraudulent patents; and these vast rights now demand recognition and protection by our Courts, as well as rights derived under patents themselves; and now the decisions of our Courts should be based on the laws of Congress and the changed relations of the Government towards the miners, and the law of mineral patents should not be so construed as to enable patentees to wrong and defraud miners and town site claimants out of those valuable *possessory* rights with impunity; and patentees should not be sheltered in all kinds of fraud, perjury and wrong as against *possessory* rights.

This whole doctrine of the conclusiveness of mineral patents should be reconsidered, and moulded to suit the present condition of affairs, and be made to operate equitably and just toward all. As now construed, the obtaining of a mineral patent by any means, however illegal and foul, gives the holder thereof an undue and unfair advantage, and enables him to literally rob the owners of possessory rights with impunity.

3.—Defense of Fraud.

I shall say but little in reply to the arguments of the counsel on the other side on this point. I am met with the most astonishing argument here. At page 18 of their argument they say, that in a mining country nearly all witnesses swear falsely, and can be hired to do so, and ask the question, who would be safe as to a patent if perjury and fraud could be set up against one in a court of law? I answer, that all patents honestly obtained according to law would be perfectly safe, and that no patent obtained by fraud, perjury and subornation of perjury ought to be

safe! That it should be overthrown just as quickly as possible, and especially when it is obtained by fraud upon the *possessory* rights of the hard working, poor miners upon our public domain. I always supposed the object of law and courts was to defeat and overthrow fraudulent and illegally and wrongfully obtained instruments and legal rights; but the counsel on the other side seem to think that it is the sole object and duty of the Courts, and this Court especially, to sustain fraud and wrong, and to shelter and secure land pirates, perjurers and villians, in the fruits of their own wrongs and crimes. No wonder they should so argue, for they come into this Court reeking in fraud, perjury and crime, and ask this Court to protect them in the fruits of their own crimes.

It is an old and beneficent rule of law that no one shall take advantage of his own wrong, and also, that no valid right can grow out of a wrong or crime to him who commits the same; but my learned friends have read California decisions, which they claim have *eliminated* everything like fraud from the law, and hold that the main object of the Courts in that country is to cover up and protect fraud, and to secure scoundrels and perjurers in the fruits of their own wrong and crimes; but I fear they do *even* the California Courts great injustice.

I do hope I have answered this argument, and I shall not follow them through on this defense, for all of their arguments are of the same character.

4.—Equitable Estoppel.

I now come to the fourth defense of equitable estoppel. It seems to me the counsel for defendant in error utterly break down in their attempt to answer my arguments and authorities upon this defense.

At page 27 of their argument they say: "A person standing by and permitting improvements to be made

without objection, cannot be estopped unless he is the owner of the premises. If he is taking steps to preserve the title, he is not the owner."

I answer that Starr claims to have been the owner of some of these placer mining claims, and to have been in the undisputed and exclusive possession of all this ground ever since the fall of 1860, and all of them since August, 1877, and it was necessary for him to so allege and swear in his application for a mineral patent—he could not obtain such a patent unless he was the exclusive owner of and in the actual and exclusive possession of the same. The granting of a mineral patent is based wholly on the ownership of the applicant under the mining laws of Congress.

May a man who owns and holds a mining claim under the mining laws of Congress, which he need never patent, stand by and see another man, who honestly thinks he has a title, expend $10,000 on the mine or ground, and then coolly tell him, that, because he has not obtained a patent yet for his claim, he will just rob the man of all his improvements, and everything else, because the doctrine of equitable estoppel does not apply to mining claims and *possessory* rights on the public domain until a patent is obtained? Or suppose the real owner of a mining claim not only stands quietly by and sees another man in good faith expending large sums of money in useful improvements on such claim, thinking he has a title to the same, but the real owner fraudulently encourages him to go on and expend his money and labor on the same without the intention of defrauding him out of it all, and the deceived man sets up an equitable estoppel; but the other answers that he only had a possessory title, and had not yet obtained a patent to the claim, and, therefore, he must be permitted to practice his fraud and wrong with impunity upon the innocent and deceived

man. This doctrine is on a *moral* level with their side of the whole case. At page 114 of my opening argument, I discuss the point fully, and refer to 6 Peters, 431, on this very point.

NOTICE.

It is urged that we had notice, or might have had notice, of their placer claims.

In the face of the facts alleged in our answer, and admitted by the demurrer, this is an extremely desperate argument. The answer alleges and the demurrer admits, that the plaintiff in error had no notice of any kind of their pretended claim to the ground; that there was no notice on the ground, and no mining being done on it, and that none ever had been done on any part of it, but that it was occupied and possessed as a town site, and that the city itself and all settlers believed and supposed it was a town site, and made their improvements in good faith; that there was nothing in the published notice to enable any one but a skilled surveyor to determine where the ground was situated, etc., etc. Please examine the answer carefully on this point, from pages 14 to 22 of my opening argument.

It is wholly denied that there was any notice—record notice, or any other kind—until after publication, and, after that, facts are alleged to show actual fraud on the part of the patentee and his co conspirators; but it must be borne in mind that, even if there had been full notice and knowledge that the parties were obtaining a mineral patent for this ground, still no one ever had any knowledge or information that they were doing so, or that it was possible for them to do so, under the rules of the Land Office, with the *town site exception* left out. It was in this that the great fraud was perpetrated.

I have said in my first argument all I wish to say touching notices, except that it makes no difference in

law how many records there may be, so far as an equitable estoppel is concerned, if *actual* fraud is charged. Constructive notice only avails in cases of *innocent silence* and standing by, and *constructive fraud*, but not in case of conspiracy and actual fraud, as charged in the answer and admitted by the demurrer in this case.

No matter how conclusive a mineral patent may be held in regard to any or all of the facts underlying it, in so far as the validity of the patent is concerned; yet we can look into all such facts for the purposes of the defense of equitable estoppel, because we do not impeach the validity of the instrument by this defense—that is, we may allege that Starr claims to have owned these placer claims since 1860 and 1877, as one fact showing an estoppel.

The counsel for defendant in error say this whole matter was fully investigated in the Land Office; but nothing of this kind appears in the record, and, therefore, cannot be considered; but it seems to me to be a *damning* admission as to the officers of the Land Office, if it be true.

At the time all of these Leadville placer patents were issued, that city was in a wonderfully prosperous condition, and contained not less than from 16,000 to 20,000 people, and, at the lowest possible estimate, was worth from $5,000,000 to $8,000,000; and can it be possible that the officers of the Land Office in Washington, with all the facts before them, sold this whole city to these patentees at $2.50 per acre? All these facts as to Leadville are historic, and cannot be concealed, and there is not a material fact alleged in our pleadings and answer in this case but can either be proved by record evidence or by hundreds of witnesses. Even the alienage of Thomas Starr can be proved by record evidence, made by himself; for months after he perjured himself, as alleged in the

answer, he went before the clerk of the District Court for Lake county, Colorado, and declared his intention to become a citizen of the United States, thinking this would relate back and cure his disability, and enable him to hold the fruits of his crime.

Now, it is alleged in the answer and admitted by the demurrer, that Starr and his co-conspirators, by perjury, bribery and subornation of perjury, deceived and misled the officers of the Land Office, and I am glad the counsel on the other side have seen fit to attach a copy of the rulings and statement of Hon. J. A. Williams, Commissioner of the Land Office at that time, in regard to the application for this patent, to their brief and argument, and also the rulings of Secretary Schurz touching the same; and I wish to call the attention of the Court especially to these documents, for they show how effectually these officers were deceived and misled by the perjury and fraud of Thomas Starr and his co-conspirators. These rulings begin at page 37 of their argument.

The Commissioner says the weight of evidence shows that it was mineral land, and was regarded as placer ground as far back as 1860; that it had not been worked for want of water; that California Gulch was a part of the claim, and that placer mining was extending from said gulch northward. I may here say that every word of the above is wholly and absolutely false in every particular, and known to be so by the whole city of Leadville.

That part of California Gulch nearest and south of the city was worked out and exhausted in the mining excitement of 1860, over twenty years ago, and has no connection at all with this claim of Starr's or any of these placer patents. It is also known by that whole city that neither Starr nor any one claiming under him has ever done one dollar's worth of mining on any part of the ground,

or that there ever was any mining done on it, and a man would simply be considered a natural fool at Leadville who would attempt any such thing. This report also shows that Starr and his confederates made the officers of the Land Office believe that they were in the actual possession of this 164 acres of ground, and there was danger of their claims being *jumped*, all of which was false, except that the St. Louis Smelting Company have built a smelter on a mill site, I presume, taken up by them, not exceeding five acres. This statement of the Commissioner also shows the *damning* fact, that Starr and confederates satisfied the Commissioner that they had laid out some *lots*, to keep their land from being *jumped*, and had entered into satisfactory agreements to various persons to convey titles so soon as the patent should be issued. The manner and purpose for which these *agreements*, as they call them, were made are fully set out in our answer, and admitted to be true, and are true; and this shows to what an extent the officers of the Land Department were deceived and misled by the perjury and false evidence offered before them. Just one fact more. The Commissioner states, that, at that time—October 26, 1878—the town of Leadville probably contained about 1,200 inhabitants. Now, it is a matter of public history that, in October, 1878, Leadville was a large flourishing city of from 10,000 to 15,000 people anyhow, and building up in the most wonderful manner. It was at that time laid off as a city, and had a city government, and was incorporated, and contained hotels, smelters, banks, public buildings, and the property was assessed and taxed as real estate for all purposes, and the city was worth millions of dollars. I merely refer to this report or rulings of these land officers to show how effectually they were misled and imposed upon by Starr and his confederates; and I am much obliged to the counsel for defendant in

dot Commissioners Ruling

error for working it into this case, although it has no business at all in the case at present. This case must now be determined on the record properly before this Court.

At page 34 the counsel volunteer certain statements of fact contradicting the allegations of our answer, which are admitted by their demurrer, and of course such statements cannot be considered; but I will say, for their own information, that no attorneys here who are familiar with the history of this matter, would dare make such statements; but those gentlemen live in Washington, and have no personal means of knowing the actual facts of the case. They say there was no town on the land when their claim was initiated. The fact is they never had a shadow of a claim to one foot of this town site. Their claims were all false and pretended from beginning to end, so far as Thomas Starr was concerned, and his false claims were all on paper and established wholly and absolutely by perjury. Even if he had been an American citizen, he had not the shadow of a legal claim to one foot of this ground till he obtained this patent. This, however, does not prevent our setting up an equitable estoppel against any pretended claim he might have. He is estopped from denying his claim in this regard. They further say that there were no such improvements on this land as stated. Well, the city of Leadville was and still is there to show for itself. They say there were no assurances or inducements or agreements made with plaintiffs in error to induce them to refrain from opposing the issuance of the patent, or to continue making improvements. Now, the Commissioner, in his statement, says they furnished him proof that they had made agreements and assurances with the settlers on this ground, and within the last ten days I have taken the testimony of about thirty witnesses to this effect, and if necessary could take from 500 to 1,000 such depositions at any time.

They say Starr was not an alien. This is simply a matter of record, made by himself, and cannot be questioned. I simply say the learned counsel have been misinformed as to the facts of this whole case, and that all of our allegations are substantially true from beginning to end, and have never been questioned here in Colorado, either in or out of Court.

The counsel also set out Judge McCrary's opinion on the defense of estoppel. Judge McCrary heard no argument at all on any part of the answer except a brief argument at chambers on the defense of estoppel, and he heard that in a very hurried manner, and never had any familiarity with mining law or possessory rights under the mining laws of Congress, and I do not think he ever thought of such rights and ownership when he made that decision. His opinion itself shows this. It will be seen that he bases his decision on the fact that Starr and others, who stood by, had no title or ownership until the patent was obtained. It will also be seen that he is mistaken in his other proposition: that even if an owner fraudulently stands by and sees another make improvements on land to which he thinks he has a title, that such owner is not afterwards estopped from claiming the land—that the estoppel only applies to the improvements. This is simply contrary to all the authorities, and would destroy the whole doctrine of equitable estoppels.

He also bases another objection on the ground that the facts alleged as an estoppel show fraud, wholly forgetting that fraud, in some form, is the very foundation of this whole doctrine, and that the more actual fraud connected with it, the stronger it becomes.

He also objected because he thought the allegations of the answer might amount to a contract; but I show, in my opening argument, that this could not be so, and refer there to authorities. The fact is, Judge McCrary was

compelled to dispose of the case in a great hurry and without argument, and without understanding the nature of the case; and he said it must all be referred back to this Court to be fully passed upon, that the important questions raised might be finally settled as soon as possible, and therefore he referred it back in its present form.

The learned counsel say, at page 35 of their argument, that I state that the Courts of Colorado so construe the opinion of Judge Field, that no one who cannot connect himself with the paramount source of title by a patent can attack a mineral patent, and that this is a slander on our Courts. Slander or no slander, this is precisely the construction that both our United States Circuit Court and State Courts give this decision; and Judge Hallett, of our United States Circuit Court, held, that, under that decision, this doctrine applied in Courts of equity, as well as in Courts of law. In short, our Courts in Colorado have held, that, under that decision, it is absolutely impossible for any individual not having a patent from the Government to attack a mineral patent in either law or equity in his own name, and that the only possible defense is, that the patent is void on its face, or that the land is reserved from sale, or has been sold or appropriated, or an action in the name of the United States to annul the patent. I do maintain, that, under that decision, there would be no remedy in a Court of law against a *forged* patent, which was regular on its face, and the land included in it subject to sale; and I do maintain that that decision gives the holder of a patent, obtained in any manner, such an advantage over those owning possessory rights, that, as against an illegal and fraudulent patent, it substantially outlaws all possessory rights, and not only operates as a shelter to fraud, perjury, forgery, subornation of perjury, and any crime that might be resorted to for the purpose of obtaining a min-

eral patent, but it holds out an inducement to bad men to engage in obtaining mineral patents in this manner, and, therefore, turns over all of these vast and rapidly growing interests upon our mineral domain as booty to scoundrels and public land pirates. I use this word, because there is no other in our language which so exactly expresses the character of this class of men who abound in our mining camps and swarm all over our mineral domain.

The Commissioner mentions that Thomas Kemp, a disreputable character, filed a protest in the Land Office against the issuance of this patent. This was done at the last moment, it seems, by this one individual; and the Commissioner seems to have been satisfied that he was a mere blackmailer, and paid no attention whatever to his protest. Now, this is the same Thomas Kemp who was defendant in the St. Louis Smelting Company case at the last term of this Court, and, as that happened to be the first of these suits, the people of Leadville agreed to contribute toward the expenses of the suit, and make it a test case, but, after doing so, it was found out that this same St. Louis Smelting Company and the patentees actually bribed this man Kemp to turn over both sides of that case to them, so that they might so manage it in this Court, by a sham defense on the part of Kemp, defendant in error, as to secure a reversal of the judgment of the Court below, declaring said patent void, and I think the records of this Court will show this *ugly* fact. The St. Louis Smelting Company, in consideration of Kemp's thus betraying the settlers of Leadville, who had joined with him to defend their rights, actually deposited deeds to certain property in the city of Leadville to this man Kemp, to be delivered whenever his treachery should be carried out.

These facts cannot be denied. I only mention this to

suggest that, perhaps, these same astute parties used this same man Kemp to make a sham protest in the Land Office, in order to give their fraudulent patent some color of having been obtained fairly. The local Land Office at Fairplay, having personal knowledge of the facts, refused their application for the patent.

The fact is, that able lawyers were employed to carry out this whole swindle and fraud, and it was managed with all the skill and legal ability that money could secure, and every possible precaution was taken at every step to cover up the *ear-marks* of fraud and perjury, and to carry out this wholesale scheme of land piracy—the robbery of a whole city—to a successful consummation; and, as these injured and oppressed people have now laid all the facts before this, the supreme tribunal of the nation, it only remains to be seen whether they will be turned away without any adequate remedy for this great wrong.

Procedure.

The procedure in this case was under the Code of Colorado, and in strict accordance with it in so far as adopted by the United States Circuit Court. No equitable defenses can be set up in ejectments in this Court, except equitable estoppels; but fraud is now, and always has been, a legal as well as an equitable defense, and as the whole trend of our jurisprudence in both this country and England has been, for many years, to consolidate and shorten all remedies as much as possible, and to reach the "ends of justice" by the shortest possible routes, and with the least delay and expense, I cannot see why this Court should be disposed to move in the opposite direction in regard to mineral patents and possessory rights on our public mineral domain. Why make these exceptions to all general rules and to the whole progressive tendency of remedial law?

Upon examination of the pleadings, all of which are set out in full in my opening argument, the Court will see that all the facts, in all parts of the answer, are particularly and specifically alleged, and with such clearness, precision and certainty that no question can arise touching the same.

With full confidence that this high tribunal will afford my clients some adequate and speedy remedy for their great wrongs, I now submit this case.

T. A. GREEN,
Attorney for Plaintiffs in Error.

16-47

SUPREME COURT
FILED
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JAMES H. McKENNEY, CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1882.

JOHN STEEL, SARAH RAY, ET AL.,

vs.

THE ST. LOUIS SMELTING AND REFINING COMPANY.

No. 957.

Argument for Defendant in Error.

A. T. BRITTON,
WALTER H. SMITH,
J. H. McGOWAN,
Att'ys for Def't in Error.

WASHINGTON, D. C.
GIBSON BROTHERS, PRINTERS.
1882.

In the Supreme Court of the United States.

October Term, A. D. 1882.

JOHN STEEL ET AL.

vs.

THE ST. LOUIS SMELTING AND REFINING COMPANY.

No. 957.

In Error to the Circuit Court of the United States for the District of Colorado.

Brief for Defendant in Error.

In the argument of a case counsel for defendant in error are generally expected to follow the order pursued by the counsel for plaintiff in error, and answer, or endeavor to answer, the brief that he has filed.

If we fail to do this in this case, we shall rest our vindication upon the fact that the argument of plaintiffs' counsel is *sui generis*. It contains 130 pages, is diffuse, discursive, rambling, prolix, denunciatory of the Land Department and its officers, of the Attorney-General and his subordinates, and abounds in the severest reflections upon this court.

In view of these facts we shall give it but little attention, and shall consider the case in our own order, and undertake to

satisfy the court, as best we may, that there is no error in the record and proceedings below.

This case is the sequel of the cases of this defendant in error *vs.* Kemp and Ray, decided at the last term of this court. Sarah Ray, one of the plaintiffs in error, is the same Sarah Ray who was defendant in error in one of those cases.

They involved the validity of the patent to Thomas Starr, through which the defendant in error deraigns title to the premises in controversy in this case, being lot 10 in block 2 of the St. Louis Smelting and Refining Company's addition to the city of Leadville.

The court below had permitted the defendants in the action of ejectment to attack the validity of the patent by giving in evidence the record of the proceedings had before the Land Department before the patent was executed, and upon that record, held that the patent was absolutely void.

The cases therefore directly raised the question as to the conclusiveness of the patent in a collateral proceeding, and under what circumstances, and when it was open to attack in such proceeding.

They were twice argued and were very fully considered, and the law upon the entire subject very clearly laid down. We shall have occasion to refer to the opinion of the court as we proceed with this argument.

The Starr patent had been the subject of a severe contest, both before the Commissioner of the General Land Office and the Secretary of the Interior, on appeal. It had been fought vigorously step by step. A great many witnesses had been examined as to the mineral character of the land, the location of the placer claims, and the work upon them, the claim that the land was more valuable for a town-site than for mineral, and all the other questions that could arise in the case. Upon full consideration the Commissioner over-

ruled all objections and decided that a patent should issue, and his decision was affirmed by the Secretary on appeal.

We attach hereto copies of the decisions of the Commissioner and Secretary.

The cases were reversed and sent back for trial. They were test cases, and represented among others the case now before the court. After the decision of this court the plaintiffs in error (defendants below) amended their answer in this case, and it was tried and judgment given against them.

There are now pending in the court below 24 cases, as the record shows, (page 36,) which involve the same questions as this case does, and which will be controlled by the decision in this case.

These 24 cases, and some others not embodied in the stipulation found in this record, are the only ones to be affected by this decision. The other lot-holders in the now city of Leadville, or nearly all of them, have acquired the title of defendant in error, and of others under like patents, and therefore have no interest in the questions herein presented.

Those questions relate to the third amended answer of the defendants below.

That amended answer contained the general issue and several special defences, numbered two, three, and four, and a counter claim numbered five. The plaintiff below demurred to the special defences and counter claim, and its demurrer was sustained as to the second, third, and fourth special defences, and overruled as to the fifth, being what is called the counter claim.

The correctness of that ruling is the only question involved in this case.

We shall consider these special defences in the order in which they were pleaded, giving the substance of each without going greatly into detail.

II. Defence.—This defence alleges that the defendants

below have superiority of possessory title, because the premises in controversy have been, since the 1st of June, 1860, a part of a town-site, located on the unappropriated public domain, incorporated, first, under the laws of the Territory of Colorado and afterwards of the State; that the defendants have, during all that time, been in the actual possession thereof, and have quieted their title by being in possession and the payment of taxes for more than five years before the commencement of this suit; that the premises included in said town-site are neither mineral nor agricultural land, but are "a natural and necessary town-site for the large and "valuable mines and mining belt just east of said town or "city and in its immediate neighborhood;" that they have always been reserved from sale by the laws of Congress; that the only color or pretence of title by plaintiff is derived from a void patent, issued by the officers of the Land Department, for lands reserved from sale, to one Thomas Starr, on the 29th of March, A. D. 1879, for $164\frac{61}{100}$ acres of land, the said Starr being an alien and not a citizen of the United States, and not having declared his intention to become a citizen, and all of the land being included within the limits of the said city of Leadville, and that by reason thereof the officers of the Land Department had no jurisdiction to issue said patent, and the same was void.

These are all the material allegations of this defence.

The demurrer admits all the facts that are well pleaded and nothing more.

1. This defence is bad because it nowhere asserts that any steps were taken or any acts done which are required by the laws of Congress to create a town-site or city. Those steps and acts are specifically pointed out by law, and are different under different laws. (Acts of May 23, 1844, 5 Stat., 657; of July 1, 1864, 13 Stat., 343; of March 3, 1865, 13 Stat., 529; of March 2, 1867, 14 Stat., 541; of June 8,

1868, 15 Stat., 67; of March 3, 1877, 19 Stat., 392.) They all contemplate an entry and the acquisition of title from the United States. Neither the Territory nor State of Colorado had any power to dispose of public lands belonging to the United States.

The act organizing the Territory provided that "no law "shall be passed interfering with the primary disposal of "the soil."

Sec. 6, act Febr'y 28, 1861, 12 Stat., 174.

The act enabling the people to form a State government provided "that the people inhabiting said Territory do agree "and declare that they forever disclaim all right and title to "the unappropriated public lands lying within the said "Territory; and that the same shall be and remain at the "sole and entire disposition of the United States."

Sec. 4, act of March 3, 1875, 18 Stat., 474.

This defence alleges that the incorporation of the town took place under the laws of the Territory and State. *It nowhere alleges that anything was done under the laws of the United States*, and surely no authority but the United States can dispose of *its* unappropriated public lands.

It is true that the defense alleges that these lands have always been reserved from sale by the laws of Congress. But this allegation is too general. It should have stated *how* and *why* the lands were reserved so that the court could judge whether they were reserved or not.

United States *vs.* Atherton, 102 U. S., 372.

"The true way of pleading is to plead facts."

Hilton *vs.* Barrow, 1 Vesey, Jr., p. 285.

The laws of the United States do not reserve lands included in town-sites from mineral entry, not even when the

town-site has been established in accordance with Federal law. Its policy has always been to reserve its mineral lands from all disposition, except under its mineral laws. Lands valuable for minerals are reserved from sale by express provision of law.

Sec. 2318, Revised Statutes.

That section is in these words: "*In all cases* lands valuable for minerals shall be reserved from sale, *except as otherwise expressly directed by law.*" Nothing is left to implication. There must be express authority. Congress has adopted the clearest and plainest language possible on this subject.

The lands in controversy, being mineral, as they are conclusively presumed to be, as we shall show hereafter, were not reserved from mineral entry.

The reservation provided by sections 2257 and 2258, Revised Statutes, only extends to pre-emption claims. But even if it did apply to mineral lands, occupied for purposes of trade and business, such occupation was a question of fact for the Land Department to decide. (McBride *vs.* Schurz, 102 U. S., 401.) That department having decided against the alleged occupation and issued a patent for the land, its decision is conclusive in all collateral proceedings, as will be hereafter more fully shown.

Again, if the town-site had, in law, a right to the surface for town-site purposes, why is not that interest an adverse interest and the foundation for an adverse claim within the purview of the mineral laws? If it is, then it was the duty of the town-site company, or its citizens, to assert that adverse claim within the 60 days of publication, as required by section 2325, Revised Statutes; and not having done so, it and they are forever barred from setting up the same.

This question came before Secretary Delano, in 1871, in

the case of Becker *vs.* Central City. Becker was a mineral claimant to 3,000 linear feet of the Gunnell Extension, or White Lode, under the act of July 26, 1866. He claimed compliance with law, and was opposed by certain citizens of the town, who represented that said lode extended to a considerable distance under town lots and improvements owned and occupied by them in said city. The Secretary said: "In the present case the application for a patent in- "cludes the surface and soil as well as the mineral. I am "of the opinion that the persons in possession of this sur- "face are adverse claimants within the meaning of this law, "and are entitled to be heard in the local courts before a "patent is issued,"

In this connection we may as well notice the point made in plaintiffs' brief, and dwelt upon with great vehemence, as evidence of the highest fraud, relating to the want of an exception in the Starr patent of town-site rights.

There has been in the Land Department some difference of opinion as to the propriety of such an exception. It was never incorporated into a patent until 1876, and then with great hesitation. Secretaries Schurz and Kirkwood and Acting Attorney-General Phillips were against it, and Secretaries Chandler and Teller are on record in its favor. But all of them have confined it to patents for lode claims. Nobody has ever permitted it to be incorporated into a patent for placer claims, and for the very good reason that in that class of mines it is absolutely essential to have control of the surface, so as to be able to wash the dirt and soil and work the mine.

2. This defence is bad because it proposes to inquire into matters of fact which cannot be investigated in a collateral proceeding.

It alleges that the land was not mineral. That was a question of fact for the Land Department to decide before

it issued the patent. It was an antecedent fact to be determined at the very first step in the proceeding. That the finding of facts by the Land Department is conclusive and cannot be questioned in a collateral proceeding, is abundantly settled by the adjudications of this court.

In Johnson *vs.* Towsley, (13 Wall., 72,) Mr. Justice Miller, in delivering the opinion of the court, said:

"When the law has confided to a special tribunal the authority to hear and determine certain matters arising in the course of its duties, the decision of that tribunal, within the scope of its authority, is conclusive upon all others. That the action of the Land Office in issuing a patent for any of the public land, subject to sale by pre-emption or otherwise, is conclusive of the legal title, must be admitted under the principle above stated; and in all courts and in all forms of judicial proceedings, where this title must control, either by reason of the limited powers of the court or the essential character of the proceedings, no inquiry can be permitted into the circumstances under which it was obtained."

In French *vs.* Fyan, (93 U. S., 169,) a question, identical in principle with that now under consideration, came before this court. A patent had been issued to the State of Missouri for the land in controversy under its swamp-land grant. The plaintiff, in the action of ejectment, offered to prove by parol that this land was not, in fact, swamp and overflowed land.

The court below ruled "that since the defendant had introduced a patent from the United States to the State for the said land under the act of September 28, 1850, as swamp land, this concluded the question, and the court therefore rejected said parol testimony."

Mr. Justice Miller, in delivering the opinion of the court, said:

"The only question that remains to be considered is, "whether in an action at law in which these evidences of "title come in conflict, parol testimony can be received "to show that the land in controversy was never swamp "land, and therefore the patent issued to the State under "the act is void." * * *

"And we are of opinion that, in this action at law, it "would be a departure from sound principles and contrary "to well-considered judgments in this court and in others "of high authority to permit the validity of the patent to "the State to be subjected to the test of the verdict of "a jury on such oral testimony as might be brought before "it. It would be substituting the jury, or the court sitting "as a jury, for the tribunal which Congress had provided "to determine the question, and would be making a patent "of the United States a cheap and unstable reliance as a "title for lands which it purported to convey."

The reasoning of the learned justice applies with overwhelming force to the case at bar. Here is a patent which covers a large tract, on which a great number of persons occupy distinct portions. A suit necessarily must be brought against each, and a separate trial had, and the question submitted to each jury whether this land was mineral or not. It may safely be assumed that there would be some conflict of testimony on this point, and the validity of the patent would depend upon the peculiar views and findings of each jury, and the result would be that in some of the cases it would be found to be valid, and in others wholly void. It cannot be that the law would sanction a doctrine that would result in such consequences.

We call attention of the court to the cases of Shepley *vs.* Cowan, (91 U. S., 340,) and Moore *vs.* Robbins, (96 *Id.*, 530.)

In United States *vs.* Schurz, (102 U. S., 400,) Mr. Justice Miller, in delivering the opinion of the court, said:

"It is argued with much plausibility that the relator was "not entitled to the land by the laws of the United States, "because it was not subject to homestead entry, and that "the patent is, therefore, void, and the law will not require "the Secretary to do a vain thing by delivering it, which "may, at the same time, embarrass the rights of others in "regard to the same land.

"We are not prepared to say that if the patent is abso- "lutely void, so that no right could possibly accrue to the "plaintiff under it, the suggestion would not be a sound one. "But the distinction between a void and a voidable instru- "ment, though sometimes a very nice one, is still a well "recognized distinction on which valuable rights often de- "pend. And the case before us is one to which we think "it is clearly applicable. To the officers of the Land De- "partment, among whom we include the Secretary of the "Interior, is confided, as we have said, the administration "of the laws concerning the sale of the public domain. "The land in the present case had been surveyed, and under "their control the land in that district generally had been "opened to pre-emption, homestead entry, and sale. The "question whether any particular tract was open to sale, "pre-emption or homestead right is in every instance a "question of law as applied to the facts for the determina- "tion of these officers. Their decision of such question and "of conflicting claims to the same land by different parties "is *judicial in its character*.

"It is clear that the right and the duty of deciding all "such questions belong to those officers, and the statutes "have provided for original and appellate hearings in that "department before the successive officers of higher grade up "to the Secretary. They have therefore *jurisdiction of such* "*cases*, and provision is made for the correction of errors in "the exercise of that jurisdiction. When their decision of "such question is finally made and recorded in the shape of a "patent, *how can it be said that the instrument is absolutely* "*void for such errors as these?* If a patent should issue for "land in the State of Massachusetts, where the Government "never had any, it would be absolutely void. If it should "issue for land once owned by the Government, but long

" before sold and conveyed by patent to another who held " possession, it might be held void in a court of law on the " production of the senior patent. But such is not the case " before us. *Here the question is whether this land had been " withdrawn from the control of the Land Department by cer- " tain acts of other persons which include it within the limits " of an incorporated town. The whole question is one of dis- " puted law and disputed facts. It was a question for the " land officers to consider and decide before they determined " to issue McBride's patent.* It was within their jurisdic- " tion to do so. *If they decided erroneously the patent may " be voidable, but not absolutely void.*

" The mode of avoiding it, if voidable, is not arbitrarily " withholding it, but by judicial proceedings to set it aside, " or to correct it if partly wrong. It was within the pro- " vince of those officers to sell the land and to decide to " whom and for what price it should be sold; and when, in " accordance with their decision, it was sold, the money paid " for it and the grant carried into effect by a duly-executed " patent, that instrument carried with it the title of the " United States to the land."

In Quinby *vs.* Conlan, (104 U. S., 425,) this court said:

" But independently of this conclusion there is a general " answer to the alleged erroneous rulings of the officers of " the Land Department as grounds for the interference of this " court. Those rulings were upon mere matters of fact, or " upon mixed questions of law and fact, which were properly " cognizable and determinable by the officers of that depart- " ment. * * * The courts cannot exercise any direct ap- " pellate jurisdiction over the rulings of those officers or of " their superiors in the department in such matters, nor can " they reverse or correct them in a collateral proceeding " between the parties. * * * It would lead to endless " litigation, and be fruitful of evil if a supervisory power " were vested in the courts over the action of the numerous " officers of the Land Department on mere questions of fact " presented for their determination. It is only when those " officers have misconstrued the law applicable to the case,

" as established before the department, and thus have denied
" to parties rights which, upon a correct construction, would
" have been conceded to them, or where misrepresentation
" and fraud have been practised, necessarily affecting their
" judgment, that the courts can, in a proper proceeding, in-
" terfere and refuse to give effect to their action. On this
" subject we have *repeatedly and with emphasis expressed*
" *our opinion, and the matter should be deemed settled.*
" Johnson *vs.* Towsley, 13 Wall., 72.
" Shepley *vs.* Cowan, 91 U. S., 330–340.
" Moore *vs.* Robbins, 96 *Id.*, 530."

In Smelting Company *vs.* Kemp, (104 U. S., 640,) Mr. Justice Field, in delivering the opinion of the court, said:

" The patent of the United States is the conveyance by
" which the nation passes its title to portions of the public
" domain.
" For the transfer of that title the law has made numerous
" provisions, designating the persons who may acquire it and
" the terms of its acquisition. That the provisions may be
" properly carried out, a Land Department, as part of the
" administrative and executive branch of the Government,
" has been created to supervise all the various proceedings
" taken to obtain the title, from their commencement to
" their close. In the course of their duty the officers of that
" department are constantly called upon to hear testimony
" as to matters presented for their consideration, and to pass
" upon its competency, credibility, and weight. In that re-
" spect they exercise a judicial function, and therefore it
" has been held in various instances by this court that their
" judgment as to matters of fact, properly determinable by
" them, is conclusive when brought to notice in a collateral
" proceeding. Their judgment in such cases is like that of
" other special tribunals upon matters within their exclusive
" jurisdiction, unassailable except by a direct proceeding for
" its correction or annulment. The execution and record of
" the patent are the final acts of the officers of the Govern-
" ment for the transfer of its title, and as they can be law-
" fully performed only after certain steps have been taken,

" that instrument, duly signed, countersigned, and sealed,
" not merely operates to pass the title, but it is in the nature
" of an official declaration by that branch of the Govern-
" ment to which the alienation of the public lands, under the
" law, is intrusted, that all the requirements preliminary to
" its issue have been complied with. The presumptions
" thus attending it are not open to rebuttal in an action at
" law. It is this unassailable character which gives to it its
" chief, indeed, its only value, as a means of quieting its
" possessor in the enjoyment of the lands it embraces. If
" intruders upon them could compel him, in every suit for
" possession, to establish the validity of the action of the
" Land Department and the correctness of its ruling upon
" matters submitted to it, the patent, instead of being a
" means of peace and security, would subject his rights to
" constant and ruinous litigation. He would recover one
" portion of his land if the jury were satisfied that the evi-
" dence produced justified the action of that department,
" and lose another portion, the title whereto rests upon the
" same facts, because another jury came to a different conclu-
" sion. So his rights in different suits upon the same
" patent would be determined, not by its efficacy as a con-
" veyance of the Government, but according to the fluctuat-
" ing prejudices of different jurymen, or their varying ca-
" pacities to weigh evidence.

" Moore *vs.* Wilkinson, 13 Cal., 478.

" Beard *vs.* Federy, 3 Wall., 478–492."

It would seem from this citation of authorities that the question must be considered as forever settled so far as this court is concerned.

The same course of reasoning and authorities apply to the other portion of said defence which relates to the citizenship of Starr. That was a question of fact which must be considered as conclusively proved by the issuing of the patent. It was one of the " particular facts " which the Land Department was required to determine before it could issue the patent. The statute has provided what proof of citizen-

ship may be deemed sufficient. Revised Statutes, sec. 2321, provides that "proof of citizenship under this chapter "may consist, in the case of an individual, of his own affi- "davit thereof." Every application for patent must be under oath, and must and always does allege either citizenship of the applicant or a declaration of intention to become a citizen. It may be controverted; but when controverted it becomes, like every other material fact, a matter to be determined by the Land Department, and when determined it is forever and conclusively settled in all suits or proceedings, except a direct one by the United States to set aside the patent on that ground. Suppose it were otherwise? Then we should have that question depending upon the varied views or capacity of different juries, and might have different verdicts upon the question, and might suffer all the evils so forcibly stated by this court in the cases already cited.

This court in Smelting Company *vs.* Kemp, above cited, after considering the cases where the patent would be void and might be attacked collaterally, said: "So, also, according "to the doctrine in the cases cited, if the patent be issued "without authority, it may be collaterally impeached in a "court of law. This exception is subject to the qualification "that, *when the authority depends upon the existence of "particular facts, or upon the performance of certain an- "tecedent acts, and it is the duty of the Land Department to "ascertain whether the facts exist, or the acts have been "performed, its determination is as conclusive of the exist- "ence of the authority against any collateral attack, as its "determination upon any other matter properly submitted "to its decision.*"

But there is another answer to this portion of the defence. Even if Starr were an alien, it is not competent for these plaintiffs in error to set up that fact in avoidance of the

patent. No one can make that objection but the United States.

That was determined in this court by the case of Osterman *vs.* Baldwin, (6 Wallace, 116.) Baldwin was an alien. He purchased lots in Galveston, in the Republic of Texas. The constitution of Texas prohibited aliens from holding lands. He transferred his certificates of purchase to one Holman in trust for his own benefit. An execution was levied upon the lots as Holman's and they were sold under the execution. Baldwin thereupon filed a bill in equity against all the parties, and prayed that the sale and proceedings under the judgment, might be declared void and possession restored to him. The court below decreed in his favor. In this court, on appeal, it was argued that his purchase was absolutely void, because it was made in contravention of the express provision of the constitution of Texas.

But this court held that the defendants could not be heard to make that objection. Mr. Justice Davis, in delivering the opinion of the court, said: "It is true, as the defendants "insist, that when the purchases were made by Baldwin "Texas was a foreign country with a constitution forbid- "ding aliens to hold real estate. *But the defendants cannot* "*object* on that ground. Until office found Baldwin was "competent to hold land *against third persons. No one has* "*any right to complain in a collateral proceeding if the* "*sovereign does not enforce his prerogative.*"

So in this case we say that the plaintiffs in error cannot object to the patent. It is good as to third persons until office found. No one but the United States can complain. If they are satisfied all others must be. They have never complained, and it will be presumed that they are competent to take care of their own interests.

See the cases of Fairfax *vs.* Hunter, 7 Cranch, 603; Craig *vs.* Bradford, 3 Wheat., 594; Orr *vs.* Hodgson, 4 Wheat., 453; Governeur's Heirs *vs.* Robertson, 11 Wheat., 332; Cross *vs.* Devaille, 1 Wall., 1, and Phillipps *vs.* Moore, 100 U. S., 208.

Kent, (2 Com., 61,) says: "Though an alien may purchase "land, or take it by demise, yet he is exposed to the danger "of being divested of the fee, and of having his land for- "feited to the state, upon an inquest of office found. His "title will be good against every person but the state. * * * "If the alien should undertake to sell to a citizen, yet the "prerogative right of forfeiture is not barred by the aliena- "tion, and it must be taken to be subject to the right of the "government to seize the land. His conveyance is good as "against himself, and he may by a fine bar persons in rever- "sion and remainder, but the title is still voidable by the "sovereign upon office found."

In Ferguson *vs.* Neville, (Pac. Coast Law Journal for September, 1882,) the Supreme Court of California held that aliens could take and hold until office found, and that a conveyance from Chinese aliens, who were grantees of a mining location, made by qualified locators, passed the title to the mine.

We dismiss this branch of our inquiry with the single remark that the question whether a person is an alien or not is sometimes a very difficult question of mixed law and fact; and, if the Land Department should make a mistake about it and conclude that an applicant for patent was not an alien and issue a patent to him, the patent would not be void. In the most unfavorable view that can be taken of it, it would be voidable only.

There is one other matter alleged in this second defence that perhaps demands some notice.

We refer to that portion of it which relates to the quieting of defendant's title by being in possession and paying taxes for the period of five years.

This defence alleges that the patent issued to Starr, March 29, 1879. If that is so, the five years could not by any possibility have expired before the commencement of this suit. And until patent issued there could be no adverse possession. That was expressly held by this court in Linsey *vs.* Miller, (6 Pet., 666,) and Summers *vs.* Ogle, (October Term, 1881,) not yet reported. Opinion by Mr. Justice Miller.

But, in addition to this, the statute of Colorado expressly excepted from the operation of the foregoing provision all lands owned by the United States.

Section 1696, cited on page 40 of plaintiffs' brief.

III. Defence.—This defence adopts all the statements of the second defence, and alleges, in addition thereto, that the said Thomas Starr combined and confederated with one Edwin Harrison, the president of the said Smelting and Refining Company, and one August Myers, a member, and general manager of said company, and other officers of the same, to obtain said mineral patent from the Land Department by collusion, fraud, bribery, perjury, and subornation of perjury, and then proceeds to set out more in detail the specific acts by which the Government officers are alleged to have been deceived and imposed upon. It does not allege any improper conduct on the part of the Government officers.

Granting, for the sake of the argument, that this defence is sufficiently specific in its charges of fraud, &c., (which may well be doubted,) and yet the demurrer was properly sustained.

Before we proceed to the citation of authority, let us consider for a moment what this court is asked to decide, and what will be the consequences of such decision. This court

is asked to hold that a patent for lands, which has been procured by wilful false swearing on the part of the grantee and those he has procured, by bribery, to swear for him, is void, and may be so declared in an action of ejectment founded upon the patent. If so, how much wilfully false swearing must there be? If there are a hundred witnesses in the case, must ten of them be found to be guilty of perjury, or will one be sufficient? And if it can be done in the case of the mineral patent, why not in the case of a preemption or a homestead patent? And of what value would a patent be to the holder? The more valuable the property the more likely that the interested parties would undertake to prove that there was perjury and bribery in its procurement, whether that were the fact or not.

All who have been conversant with land cases know that it often happens in cases of great importance that there is much conflict in the testimony. Witnesses swear directly opposite to each other; some of them must be wilfully false.

This is especially true of mining cases. The witnesses are often "border" men, who have been absent from the restraints of home and family and religious institutions, and have lost that delicate and nice sense of duty which would lead them to feel that a false statement under oath was a great crime. They are often, no doubt, procured to testify falsely. If a patent can be defeated in an action at law we shall have a new field of litigation, and there is no telling where it will end. It will be the interest of every defendant to attack the patent on the ground of fraud. And it will be done in all cases where the property is of great value.

Is it not better to hold that the credibility of the witnesses is for the Land Department to consider and that its judgment is, like that of other judicial tribunals, and can be set aside only for such frauds as would operate to set aside and

annul the judgments of courts of general or special jurisdiction?

The question of fraud in the procurement of a decree was considered with great ability in the case of the United States *vs.* Flint, (4 Sawyer, 42.) That was a bill in equity filed by the United States to set aside a patent issued for a private land claim on the ground that the decree of the court confirming the claim was procured by fraud in this, that the grant and juridical possession were made subsequently to the acquisition of the country in 1846, and were antedated; that the claimant fraudulently omitted to exhibit a complete record of the proceedings and that by this suppression the law agent of the United States was misled, and the Land Commissioners and the U. S. court deceived into a confirmation of the claim.

Mr. Justice Field said:

"On principle, such adjudications cannot be reviewed or "defeated by a court of equity upon any suggestion that "the commissioners and court misapprehended the law or "were mistaken as to the evidence before them, even if "that consisted of fabricated papers supported by perjured "testimony.

"The very questions presented by the present bill were "necessarily involved in the proceeding before the commis- "sioners and the district court, and the credibility of the "testimony offered was a matter considered by them. "Whether the grant produced by the claimant was genuine "and the claim resting thereon was entitled to confirmation "were points at issue. The bill avers that the alleged grant "was not genuine because it was antedated. But the "genuineness of the document was the matter *sub judice*, "and could not have been established and the claim based "upon it affirmed, except by evidence satisfactory to the "commission and court; that it was made at the time "stated.

"It is to no purpose in such case to invoke the doctrine

" that fraud vitiates all transactions, even the most solemn,
" and that a court of equity will set aside or enjoin the en-
" forcement of the most formal judgments when obtained
" by fraud. The doctrine of equity in this respect is not
" questioned; it is a doctrine of the highest value in the ad-
" ministration of justice, and its assertion in proper cases is
" essential to any remedial system adequate to the necessities
" of society. But it cannot be invoked to reopen a case in
" which the same matter has been once tried or so put in
" issue between the parties that it might have been tried.
" The judgment rendered in such a case is itself the highest
" evidence that the alleged fraud did not exist, and estops
" the parties from asserting the contrary. It is afterward
" mere assumption to say that the fraud was perpetrated.
" The judgment has settled the matter otherwise; it is *res*
" *adjudicata*.

" The frauds for which courts of equity will interfere to
" set aside or stay the enforcement of the judgment of a
" court having jurisdiction of the subject-matter and the
" parties must consist of extrinsic collateral acts, not in-
" volved in the consideration of the merits. They must be
" acts by which the successful party has prevented his ad-
" versary from presenting the merits of his case or by which
" the jurisdiction of the court has been imposed upon.

" All litigants are equally entitled to justice from the tri-
" bunals of the country; they can claim equal opportunities
" of producing their testimony and presenting their case,
" and they can equally have the advocacy of counsel.
" Whenever one party by any contrivance prevents his ad-
" versary from having this equality with him before the
" courts, he commits a fraud upon public justice, which re-
" sulting in private injury, may be the ground of equitable
" relief against the judgment recovered. Thus, if through his
" instrumentality, the witnesses of his adversary be forcibly
" detained from the court or bribed to disobey its subpœna,
" or the testimony of his adversary be secreted or purloined;
" or if the citation to him be given under such circumstances
" as to defeat its purpose, a fraud is committed, for which
" relief will be granted by a court of equity, if it produce in-
" jury to the innocent party. Any conduct of the kind men-

" tioned would tend to prevent a fair trial on the merits,
" and thus to deprive the innocent party of his rights. So
" if the litigation be collusive; if the parties be fictitious;
" if real parties affected are falsely stated to be before the
" court, the judgment recovered may be set aside or its
" enforcement restrained—for in all these cases there would
" be the want of the actual litigation, which is essential to a
" valid judicial determination.

" To every such case the words of the jurist would be ap-
" plicable: *Fabula, non judicium, hoc est; in scena non in*
" *foro res agitur.*

" The credibility of testimony given in a case bearing upon
" the issue is not an extrinsic collateral act, but it is a mat-
" ter involved in the consideration of the merits, and the
" introduction of false testimony, known or shown to be so,
" does not affect the validity of the judgment rendered. In
" every litigated case, when the interests involved are large,
" there is generally conflicting evidence.

" Witnesses looking at the same transaction from the dif-
" ferent standpoints give different accounts of it. The state-
" ments of some are unconsciously affected by their wishes,
" hopes, or prejudices. Some, from defective recollection,
" will blend what they themselves saw or heard with what
" they have received from the narration of others. Uncer-
" tainty as to the truth in a contested case will thus arise
" from the imperfection of human testimony. In addition
" to this source of uncertainty may be added the possibility
" of the perjury of witnesses and the fabrication of docu-
" ments. The cupidity of some and the corruption of
" others may lead to the use of these culpable means of
" gaining a cause. But every litigant enters upon the trial
" of a cause, knowing not merely the uncertainty of human
" testimony when honestly given, but that if he has an un-
" scrupulous antagonist he may have to encounter frauds of
" this character. He takes the chances of establishing his
" case by opposing testimony and by subjecting his oppo-
" nent's witnesses to the scrutiny of a searching cross-exami-
" nation. The case is not the less tried on its merits, and
" the judgment rendered is none the less conclusive by rea-
" son of the false testimony produced. Thus if an action

"cited in its support—and there are none in conflict with "it—there can be no doubt that the court below erred in ad- "mitting the record of the proceeding upon which the patent "was issued, in order to impeach its validity. The judg- "ment of the Department upon their sufficiency was not, as "already stated, open to contestation. If in issuing a patent "its officers took mistaken views of the law or drew erro- "neous conclusions from the evidence, or acted from imper- "fect views of their duty, *or even from corrupt motives*, a "court of law can afford no remedy to a party alleging that "he is thereby aggrieved. He must resort to a court of "equity for relief, and even there his complaint cannot be "heard unless he connect himself with the original source of "title, so as to be able to aver that his rights are injuriously "affected by the existence of the patent; and he must pos- "sess such equities as will control the legal title in the "patentees' hands. (Boggs *vs.* Merced Mining Company, "14 California, 363–4.) It does not lie in the mouth of a "stranger to the title to complain of the act of the Govern- "ment with respect to it. If the Government is dissatisfied "it can, on its own account, authorize proceedings to vacate "the patent or limit its operations."

And proceeding, the court said:

"The case at bar, then, is reduced to the question whether "the patent to Starr is void on its face; that is, whether, "read in the light of existing law, it is seen to be invalid. "It does not come within any of the exceptions mentioned "in the cases cited. The lands it purports to convey are "mineral, and were a part of the public domain, The law "of Congress had provided for their sale. The proper offi- "cers of the Land Department supervised the proceedings. "It bears the signature of the President, or rather of the "officer authorized by law to place the President's signature "to it—which is the same thing—it is properly counter- "signed, and the seal of the General Land Office is attached "to it. It is regular on its face, unless some limitation "in the law, as to the extent of a mining claim which can "be patented, has been disregarded."

We rely upon these authorities as conclusive of the question.

IV. DEFENCE.—This defence adopts the allegations of the second defence, and sets up the following additional matter by way of estoppel: That the said Starr was living in the said city of Leadville from 1860 until the issuing of said patent on the 29th of March, 1879, and was cognizant of all the improvements made therein and of the large sums of money that were expended thereon; that he and his grantors intentionally and fraudulently kept quiet in regard to his and their ownership of said mining claims, and never, from August, 1877, up to the time of the application for patent, made known to the city or defendant that the said Starr pretended to claim any right to any portion of said land; that the August Myers who claimed to have located 31.61 acres included in the patent also stood by and kept quiet as to his claim just as Starr did; that these defendants, up to the date of said application for patent, expended the sum of $5,000 in making improvements on the premises included in this action under a *bona fide* claim to the same as a part of a town-site on the public domain of the United States, and up to the date of said application had no notice of any claim by Starr or Myers or Harrison to the same; that no mining was ever done on said land, and no notice was given that would lead them to suppose that there had been any mineral location thereon; that Starr only published his notice for said patent in a weekly paper in said city of Leadville, and that the description of said consolidated placer claim was so made by the surveyor that no one but a skilled surveyor could tell where said land was situated, and that this was done intentionally and fraudulently; that said Starr and his co-conspirators secreted from defendants all their efforts to obtain said patent until their notice was published and afterwards, so far as they were able, and wholly

concealed the fact that they were endeavoring to obtain a mineral patent with the exception left out as to a town-site and surface improvements, and that they stood by all the time they were obtaining said patent from the 8th day of March, 1878, until the 29th of March, 1879, and witnessed the improvements of the defendants and others on said lots and in the city of Leadville, without giving any notice that they were endeavoring to obtain a patent with excepting clause aforesaid left out; but, on the contrary, after defendants found out by other means than said notice that their application included land situated in said city, they assured these defendants that neither they nor the other settlers would be disturbed or interfered with in their rights and possessions, and that, at most, only a nominal sum would be expected or demanded of them, and in no case to exceed $25 per lot; that these assurances were circulated to induce defendants and others to continue making improvements, which they did until the patent was issued, March 29, 1879, and that thereafter the plaintiff disregarded said assurances and demanded the full value of said lots; that these defendants, relying on said assurances and promises, expended not less than $5,000 in making improvements on said premises from the time the notice of application for patent was published until the patent was obtained by Starr; and that this was in addition to the improvements made prior to said publication; that these assurances and promises were made for the purpose of misleading defendants and others and inducing them not to make opposition to the issuing of said patent, and that they were misled and did not oppose the issuance of the patent. They further state in said fourth defence that they have tendered to the plaintiff $25 for each lot, which it has refused to receive.

This defence, when analyzed, consists of three different branches. The first relates to certain matters of fraud

on the part of plaintiff. The second, to the conduct of plaintiff in standing by and seeing money expended upon the premises in dispute without making known that it was proceeding to obtain a patent; and the third relates to promises made to the defendants which induced them to believe that they could acquire title from plaintiff after it should procure its patent.

As to the first, we dismiss it with the remarks we have already made on the III Defence.

The second was evidently intended as matter of estoppel. But it lacks some of the essential ingredients of an estoppel.

1. A person standing by and permitting improvements to be made without objection cannot be estopped unless he is the owner of the premises. If he is taking steps necessary to procure the title he is not the owner.

Lord Coke, in giving the rules that relate to estoppel, says: "Fifthly, regularly a man shall not be concluded by accept-"ance, *or the like, before the title accrued.*"

3 Co. Lit., 432.

In Whittaker *vs.* Williams, (20 Conn., 103,) the court say: "A sale of property is held valid against the *true owner* "when he stands by and knowingly suffers a stranger to sell "it in his own name as his own property, without objec-"tion."

In 3 Wash. R. P., 76, it is said: "If the *true owner* not only knows of such expenditures," &c.

In Bank *vs.* Lee, (13 Pet., 119,) the court say: "If the *true* "*owner* stand by and does not make his title known," &c.

It is sometimes said that the party will not be estopped unless he can make a deed for the property. That means that he must have the legal title.

Upon principle the party to be estopped should be the one who has title to the property.

Patterson *vs.* Esterly, 27 Ga., 207;
Carter *vs.* Champion, 8 Conn., 554;
Fisher *vs.* Mossman, 11 Ohio State, 47;
Odlin *vs.* Gove, 41 N. H., 477;
Bigelow *vs.* Topliff, 25 Vt., 287; and
Brencherhoff *vs.* Larreson, 4 John. Ch., 70.

In the light of these authorities it cannot be claimed that these parties were misled by the silence of this defendant.

III. The promises set out in this defence do not create an estoppel.

In view of what is said by this court in Insurance Co. *vs.* Mowry, (96 U. S., 547,) it is quite doubtful whether the representations must not relate to the present, or the past, in order to create an estoppel.

We have not been able to find a case where an agreement to do some *future act* has ever been held to work an estoppel.

We suppose the reason to be that such an agreement, if it has any force and effect, and is not complied with, may be the foundation of an action, either at law or in equity.

There is, however, in this case an additional ground upon which to place our objection to the assurances given, and that is that there is nowhere in this defence any allegation that they were given by the defendant in error or in such a way as to bind it. The allegation is that "the said Starr, "and the said Myers & Harrison by themselves, and by and "through A. P. Henford, their agent and attorney, after de- "fendants and other settlers found out by other means than "said notice that the same included land situated in said city "and on said town-site, assured defendants and other set- "tlers on said lot and land, after the notice for said patent "was published, that in case said patent should be obtained "that neither the defendants nor any of the settlers on said

" lots would be disturbed or interfered with in their rights " and possession, and that at most only a nominal sum would " be expected or demanded of defendants and other settlers " on said town-site, and in no case to exceed $25 per lot to " assist in paying the necessary expenses of obtaining said " patent, and advised defendants and other settlers as afore- " said to go on making their improvements and expending " their money in building up said city."

There is in all this no allegation that the defendant in error authorized Myers or Harrison or Henford, (their attorney, not defendant's attorney,) to make these assurances. The defendant in error is an incorporated company of the State of Missouri, and no officer of it, much less attorney, could bind the company in disposing of its real estate unless authority for that purpose had first been given by the company. This is too clear for argument.

It may be replied that the following clause in the defence meets this objection, to wit: " And defendants allege that " said parties and *plaintiff company* caused said false and " fraudulent reports and assurances to be circulated among " said settlers to induce them all to continue making said im- " provements."

But what " false and fraudulent reports and asssurances " this defence does not show.

The assurances set out above cannot be characterized as " false," and the pleading itself lacks that certainty and precision which the law requires in pleading an estoppel.

Again, we suggest to the court that this defence substantially presents, as matter of estoppel, an agreement by which defendants, with knowledge of the illegal and corrupt conduct therein alleged, were to become parties to the same and aid in procuring the patent by not opposing its issuance, on condition that they should receive as their share of the illegal

proceedings the city lots in their possession at not less than $25 per lot.

It requires no argument to satisfy any judicial tribunal that there is no estoppel in such an agreement.

We conclude our examination of this IV Defence by citing the language of the learned circuit judge who tried the case below. He said:

"The principle sought to be evoked, I apprehend, upon "this branch of the case is the very familiar rule of the "law of estoppel, that if the owner of an estate stands by "and sees another erect improvements on the estate in the "belief that he has the right to do so, and does not interpose "to prevent the work, he will not be permitted to claim said "improvements after they are erected.

"In the first place it is extremely doubtful whether that "principle of the law can be invoked in a case of this "character, for it is not claimed and cannot be that at the "time these plaintiffs are charged with having stood by and "advised the erection of these improvements, they were the "owners of this property; and I have never heard it asserted "before that a party who intends to purchase land, or who "has applied to the owner for the right to purchase it, stands "in the position of ownership within the meaning of this "principle, so that he is bound to warn all persons to make "no improvements upon such land, at the peril of losing "them.

"Assuming, however, that for the purposes of this de- "cision the defendants did stand in the relation of owners "of this land at the time, I do not think this principle of "the law of estoppel can be carried so far as to hold that "even the owner of real estate who stands by and sees "another make improvements upon it, and makes no objec- "tion, is thereby estopped thereafter to claim the title of "the real estate; he may be estopped to claim the improve- "ments, but I do not think that he is estopped to claim the "title in an action of ejectment.

"There is another reason why it is difficult to hold that "this doctrine of estoppel can apply to a case like this. The

" law prescribes the mode and manner by which entries of " the public mining lands are to be made, and, among other " things, it is provided by section 2335 of the Revised Stat- " utes of the United States, that an applicant for a mineral " patent must post a plat of the land and a notice of his ap- " plication for a patent in a conspicuous place on the land " embraced in such plat. Now it must be presumed that " this law was complied with, and if so, how can it be said " that the parties applying for the patent gave no notice, no " warning to anybody? The very fact of their giving this " notice was of itself a warning to all who were upon the " land, or were about to erect improvements upon it, that " these parties were applying for a patent and were seeking " to obtain the title. Moreover, it is admitted by this an- " swer that they did, in fact, ascertain the fact of this appli- " cation for a patent. Now, one of the familiar rules with " regard to estoppel, which we all understand perfectly, is " this: That the party to whom the representations are made " must be ignorant of the truth of the matter about which " they are made. If he knows the fact, and chooses to take " his chances, the other party is not estopped.

" For all these reasons, then, we are constrained to hold " that the allegation that the plaintiffs and their grantors " stood by while these improvements were being made, and " made no objection, does not amount to a good plea of es- " toppel in this action of ejectment.

" The other allegation under this head is that, after the " defendants were notified and informed of this application " for a patent, they had an arrangement with the plaintiff, " by which the plaintiff assured them that after obtaining a " patent, it would sell to them for a nominal price, and " would not disturb them in their possession. This is not a " good plea of estoppel. It lacks some of the essential " elements of such a plea. It alleges an arrangement, under- " standing, or agreement entered into confessedly with full " notice on the part of defendants that Starr had applied " for a patent, with a view to obtaining title to the land, and " by which defendants were to obtain that title from Starr, " or plaintiff, after it should be vested in one or all of them. " How then can it be set up as an estoppel to prevent

" plaintiffs from recovering that title in ejectment; defendants
" did not act in ignorance of the facts, but with notice, rely-
" ing upon the promise of plaintiffs to convey the title upon
" certain terms and conditions after obtaining it. If, there-
" fore, the arrangement amounted to anything, it is simply a
" compact union which, if it be valid and binding, defendants
" may be entitled to have a remedy. If it be a contract
" capable of specific performance, it must be in a court of
" equity. If it be one upon which defendants are entitled
" to recover damages, the proper action must be brought for
" that purpose. As the arrangement, whatever it was,
" clearly contemplated the obtaining of the legal title by
" plaintiff, it cannot be set up by way of estoppel in the
" present action."

In our discussion of this case thus far we have endeavored to confine ourselves to the record and to regard as admitted all the allegations of the several defences, which are well pleaded. In view of the example set us by counsel for plaintiff we should certainly be excused, if not justified, in departing somewhat from the record, and stating that the real facts are in almost every instance entirely different from those pleaded.

There was no town on our land when our claim was initiated; there was no perjury or bribery in its prosecution. Thomas Starr was a person who had come into the United States under the age of sixteen, declared his intention to become a citizen, and was afterwards naturalized; there were no such improvements on our lands as stated; there were no assurances or agreements made with defendants below to induce them to refrain from opposing the application for patent and to continue in making improvements; they did bitterly oppose every step that was taken; the land was and is mineral; and, in short, there was no fraud practised either upon the defendants or the law. The case was fairly and honestly heard and decided after a painstaking

and careful examination by the Commissioner and Secretary and his legal adviser. All the questions that could be made were made, and the facts fully found and decided. The Commissioner, in his decision, said :

" The facts which are clearly established by the proof are, " 1st. That the land in question is mineral. 2d. That the min- " eral claims represented by Starr had their inception long " prior to the occupation of any portion of said land as a town- " site. 3d. That a large amount of money has been expended " thereon in developing the mine, in the construction of re- " duction works, and in bringing water from a distance to " work the claim, and that the development of the mine is " proceeding in good faith.

" From these facts I conclude that the application of " Thomas Starr, when duly perfected, should be allowed, " and that no exception of any town-site rights should be " inserted in the patent, for the reason that his claim is a " surface claim, and is anterior to town-site occupation, no " adverse or conflicting right having been acquired by the " town or by individual settlers who went there with record " notice of the ownership of said placer ground. It is " proper to add that there is no opposition to Starr's appli- " cation by the town authorities of Leadville."

Without attempting to answer in detail the statements made in the brief of counsel for plaintiff or the positions which he has assumed, we say generally that he has misapprehended the scope of the decision in the Kemp case. He has sought, in every way imaginable, to bring it into disrepute. He has informed us that speculators under its authority attempted to fraudulently acquire thousands of acres of valuable mineral lands, without at the same time informing us that it was done at his instigation, and for the purpose of making that decision unpalatable. He has asserted that the State and United States courts in Colorado construe that case as deciding that no one not connected with the paramount source of title can, at law, contest the validity

of a patent, and that, being connected with the paramount source of title means having a patent for the same premises, which is a slander on those courts. He has claimed that under it a forged patent could not be defended against, which is absurd; and he has brought into the case a circular of Secretary Teller, which he would have us believe was intended to set at nought the decision of this court.

We are not called upon to defend that circular. It seems to have been crudely prepared, and requires, and doubtless will receive, some qualification. But, right or wrong, it has nothing to do with the questions now before this court.

Counsel for plaintiff in error argues, in one part of his brief, that the duties of the officers in the Land Department in reference to mineral patents are purely ministerial in their character, and very simple and easily performed upon *ex parte* affidavits, and require no exercise of judicial functions; and yet, in another portion of his brief, he claims that the mining laws form one of the most complicated and difficult systems of law that the world ever saw.

In enumerating the several provisions of the section of law regulating the application for patent he omits that one which provides that if no adverse claim is filed, "thereafter "no objection from third parties to the issuance of a patent "shall be heard, except it be shown that the applicant has "failed to comply with the terms of this chapter."

It is under this clause that most of the severe and protracted contests arise in the Land Department.

We shall omit any further reference to the remarkable brief of plaintiffs' counsel. We trust that sufficient has already been said in this case to justify this court in holding that there was no error in the rulings of the Circuit Court.

A. T. BRITTON,
WALTER H. SMITH,
J. H. McGOWAN,
Attorneys for Defendant in Error.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *October* 26, 1878.

REGISTER AND RECEIVER,
Fairplay, Colorado:

GENTLEMEN: I have examined the record of testimony submitted at a hearing in your office in the matter of a protest of Thomas Kemp against Thomas Starr's application for a patent to the "Starr Placer" claim. On allegations by Thomas Kemp *et al.*, that the land involved in said application was non-mineral in character, you were authorized to to hold a hearing to determine the fact. This hearing was commenced July 30, 1878, and the record was forwarded with your letter of 6th September last.

In the trial it was sought by Kemp *et al.* to show that the land was non-mineral, and of more value for a town-site than for mining purposes, the claim of Starr being within the limits of the town of Leadville.

The weight of testimony shows that all the land embraced in this claim was regarded as placer mining ground as early as 1860; that it was prospected with favorable results in different localities; that it has not all been worked because of the limited supply of water and want of proper facilities; that "California Gulch," which is a part of this claim, and lies on the southerly portion thereof, has been worked for a long time, and a large amount of gold taken therefrom; that placer mining is being extended from said gulch northwardly towards the settled portion of the town; and that, while gold has been found in all parts of this claim, no one has opened a shaft on the northern part of the claim, which has been sunk to bed-rock, and it is manifestly impossible to estimate with any certainty the value of that part of the claim as mineral land, yet that it is mineral land of more or less value is clearly established by the record. It also appears that it is not feasible to work the northern portion of the claim until after the lower portion shall have been worked out. It shall be reached by slow approaches in the regular progress of operations, which are gradually being extended from California Gulch towards the north, and hence the fact that it has not been worked cannot have the

effect of raising even a presumption of its non-mineral character. It also appears that a portion of this claim was purchased by the St. Louis Smelting and Refining Company by A. R. Meyer, its agent, and that expensive reduction works have been erected thereon. This enterprise, together with the reputation of the surrounding country for its mineral resources, has within the last few months induced a sudden influx of population, whose residence or occupancy will doubtless depend upon the mining prosperity of the locality. The evidence shows that there are probably about 1,200 inhabitants in Leadville.

In order to prevent the land in this claim being "jumped," and its proprietors dispossessed to the extent of such occupancy, lots for building purposes were laid out on the northern part of the survey, and various persons permitted to build thereon on certain considerations, agreements being executed to convey perfect title on receiving a patent from the United States for the claim.

It seems to have been generally conceded that this mining claim was in all respects legitimate, and that title to no part thereof could be derived from any party except the proprietors. This was evidently the understanding upon which all sales and agreements were made. Within the last few months certain parties have sought to obtain a foothold on the land embraced in this claim by building thereon without authority. It appears, however, that most of such persons were summarily removed.

Mr. Kemp, protestant, went upon the northern part of this claim—whether by any proper authority does not appear—and erected a house, which, from the evidence, is used for a drinking and gambling saloon and "dance-house." It appears that there was opposition to his building, and that he then opposed the claim of Starr. It is in the evidence that Kemp offered to withdraw his protest on condition that the owners of the placer claim would give him title to certain lots thereon. This is not contradicted, and is to a degree an indication of Kemp's faith in the title thus sought to be derived through the mineral claim.

The facts which are clearly established by the proof are—1st. That the land in question is mineral. 2d. That the

mineral claims represented by Starr had their inception long prior to the occupation of any portion of said land as a town-site. 3d. That a large amount of money has been expended thereon in developing the mine, in the construction of reduction works, and in bringing water from a distance to work the claim, and that the development of the mine is proceeding in good faith.

From these facts I conclude that the application of Thomas Starr, when duly perfected, should be allowed, and that no exception of any town rights should be inserted in the patent, for the reason that his claim is a surface claim, and is anterior to town-site occupation, no adverse or conflicting right having been acquired by the town or by individual settlers who went there with record notice of the ownership of said placer ground. It is proper to add that there is no opposition to Starr's application by the town authorities of Leadville.

The affidavit of Thomas Starr, stating in detail all charges and fees paid by him for publication and surveys, together with all fees and moneys paid to the Register and Receiver of the land office, in the matter of his said application for patent, will be required.

Very respectfully,

J. A. WILLIAMSON,
Commissioner.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *March* 4, 1879.

To the COMMISSIONER OF THE GENERAL LAND OFFICE:

SIR: I have considered the case of Thomas Kemp *et al.* *vs.* Thomas Starr, involving mineral application No. 177, Fair Play, Colorado, on appeal from your decision of October 26, 1878, holding that the land in question is mineral in character.

At the hearing held evidence as to the character of the land was submitted, and also as to its relative value for mining and town-site purposes. The evidence of the numerous witnesses was, as is usual in such cases, conflicting and contradictory.

After a careful consideration of the same I concur with you, that the land embraced in the application is land which should, under the provisions of section 2318, Revised Statutes, be held as "valuable for minerals," and should be reserved from sale except as provided by law regulating the sale of mineral lands.

In my opinion the evidence submitted as to the relative value of the land for town-site or mining purposes was improperly allowed. If the land is mineral it was subject to location only under the provisions of the mining law without reference to the relative value of a portion of the tract for town-site purposes.

Very respectfully,

C. SCHURZ,
Secretary.